90-830

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BELL ATLANTIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in administering a federal consent decree that governs the bulk of the nation's telephone industry, the lower courts exceeded their Article III powers and violated the "four corners" rule of *United States v. Armour & Co.*, 402 U.S. 673 (1971), by ruling, on the basis of non-textual "pragmatic" considerations, that a prohibition against the *sale* of long-distance telephone service bars companies from *using* long-distance service to communicate with their own customers in the conduct of their authorized businesses.

PARTIES AND AFFILIATED COMPANIES

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties in the court of appeals were as follows:

American Telephone and Telegraph Co.
Bell Atlantic Corporation
BellSouth Corporation
BT Tymnet Inc.
MCI Communications Corporation
NYNEX Corporation
Pacific Telesis Group
Southwestern Bell Corporation
United States of America
United States Telephone Association
U.S. Videotel, Inc.
U S WEST, Inc.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that it is a publicly held corporation. It owns the following subsidiaries that have securities in the hands of the public:

The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
New Jersey Bell Telephone Company
Bell Atlantic Capital Funding Corp.
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corp.
Bell Atlantic Systems Leasing International, Inc.
Bell Atlantic Tricon Leasing Corp.
Telecommunications Specialists, Inc.

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PETITION FOR WRIT OF CERTIORARI

Bell Atlantic petitions for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a)[1] is reported at 907 F.2d 160. The opinion of the United States District Court for the District of Columbia (App. 11a-21a) is reported at 1989-1 Trade Cas. (CCH)

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[1] "App." refers to the Appendix to this petition.

¶ 68,400. The district court's order in response to a motion for clarification (App. 22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. App. 1a. Petitioner's timely petition for rehearing was denied on August 28, 1990. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSENT DECREE PROVISIONS INVOLVED

This case arises out of the lower courts' administration of the AT&T consent decree. The decree—set forth in *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982)—is reproduced in full, as amended, at App. 25a-43a. The entry of the decree was summarily affirmed by this Court, with three Justices dissenting. *Maryland v. United States*, 460 U.S. 1001 (1983).

Section II of the decree provides, in relevant part:

> D. After [divestiture], no [Bell company] shall, directly or through any affiliated enterprise:
>
> 1. provide interexchange telecommunications services . . . .

Section IV of the decree provides, in relevant part:

> K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.
>
> O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing . . . .
>
> P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

The detailed plan for divestiture, which involved a judicial construction of the foregoing sections of the decree, was approved by the district court in *United States v. Western Electric Co.*, 569 F. Supp. 1057 (D.D.C. 1983), relevant portions of which are reproduced at App. 44a-52a. This Court summarily affirmed that decision in *California v. United States*, 464 U.S. 1013 (1983).

STATEMENT

A. The Decree

In 1982, the United States District Court for the District of Columbia approved a consent decree settling the government's massive antitrust suit against the American Telephone and Telegraph Company. The decree required AT&T to divest its local Bell telephone companies and prohibited the divested companies from providing (among other things) long-distance telecommunications services "for hire."

In agreeing to the divestiture and the long-distance prohibition, the parties made a fundamental choice about how finely to divide the Bell System into new entities and services. The government sought to divide the Bell System into local and long distance service providers. AT&T sought to preserve some of the efficiencies of integrated operation. The resulting decree was a compromise: The divested Bell companies would provide common carrier telephone service only *within* exchange areas (which are referred to in this litigation as Local Access and Transport Areas, or "LATAs"), of which there were to be some 160 nationwide. Long distance companies would provide common carrier services *between* LATAs. The Bell companies, of which there were only seven, would be permitted, however, to centralize their business activities efficiently, using long-distance lines to link together their internal operations and to communicate with their customers across LATA boundaries.

The parties expressed this compromise in the term "for hire," which they borrowed from the Communications

Act of 1934. The decree prohibits the Bell companies from providing "interexchange telecommunications services"—the decree's term for long-distance services. § II(D) (App 28a). The decree defines "telecommunications service" as the "offering *for hire* of telecommunications facilities, or of telecommunications by means of such facilities." § IV(P) (App. 32a) (emphasis added). By that definition the parties sought to prevent the Bell companies from *selling* long-distance services to others. Nothing in the decree, however, bars them from *using* long-distance facilities themselves to deliver authorized services to their own customers.[2]

B. The 1983 "For Hire" Interpretation

In 1983, immediately after the decree was entered and during the district court's consideration of the plan for implementing the divestiture, the district court was called upon to interpret the "for hire" limitation. The question arose whether the Bell companies could construct and own the long-distance facilities they used to connect their internal operations and to communicate with customers. *United States v. Western Electric Co.*, 569 F. Supp. at 1097-1101 (App. 44a-52a). For example, the Bell companies provided "411" voice directory assistance to their customers in multiple LATAs from one centralized bureau; they wanted to own or lease the long-distance lines they used to bring this service to their customers in the various LATAs served by the bureau. The district court concluded that, even though a charge may be assessed for the total directory assistance service (*id.* at 1097 n.175), the long-distance component "[o]bviously" was not offered "for hire" within the meaning

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[2] Other provisions of the decree also distinguish between a Bell company's sale and use of a product. For example, the decree permits a Bell company to use, but not sell, telecommunications equipment. Decree § II(D)(2). Similarly, absent a waiver, the decree permits a Bell company to use, but not sell, information services. Decree §§ II(D)(1), IV(J).

of the decree. *Id.* at 1100. To conclude otherwise, the district court noted, would deny the Bell companies significant "operational and cost efficiencies" and instead would require the creation of "separate, self-contained" telephone companies for each of the nation's 160 LATAs —"a result clearly not contemplated by the decree." *Id.* at 1099.

The 1983 ruling therefore confirmed, for example, that Bell Atlantic's Chesapeake and Potomac Telephone Company can provide local "411" directory assistance to its Washington, D.C., customers from a centralized operator bureau in West Virginia. These calls are carried over long-distance facilities owned and maintained by C&P, and customers pay a charge for the directory assistance service. But, because the long-distance facilities used in delivering the directory information are not offered separately to the public "for hire," C&P is not providing a prohibited "interexchange telecommunications service" under the decree.

The district court noted that, to resolve any uncertainty about the Bell companies' authority, it would decide the interpretive issue "now [in 1983], rather than after divestiture, so that the [Bell] Operating Companies may be able to continue their essential network and operational planning." *Id.* at 1101 n.191. None of the over 100 parties to the 1983 proceedings contested the district court's interpretation of "for hire," and the decision, of which that interpretation was a part, was summarily affirmed by this Court. *California v. United States*, 464 U.S. 1013 (1983).

Relying on the "for hire" interpretation, as the district court invited them to do, Bell Atlantic and the other Bell companies have centralized many services involving long-distance communications with customers—including voice directory assistance, business office and repair services, operator services, bill processing and collection, and

"800" number call processing—realizing substantial operating efficiencies as a result.

C. The Gateway Services Waiver

In decisions issued in 1987 and 1988, the district court partially waived the consent decree's "information services" restriction to allow the Bell companies to provide "gateway services." *United States v. Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987), and *United States v. Western Electric Co.*, 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part, remanded in part on other grounds*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 59 U.S.L.W. 3277 (U.S. Oct. 9, 1990).

"Gateway services" facilitate access by personal computer users to a wide variety of computerized information. The particular gateway function that turned out to be controversial here furnishes a directory of third-party information providers. This visual directory function allows computer users to quickly identify and call information services just as voice directory assistance allows conventional telephone users to obtain telephone numbers for making ordinary voice calls.

In granting the waiver to permit the Bell companies to provide gateway service, the district court stressed the importance of bringing such innovations to consumers at "affordable prices"; further, the district court stated that the Bell companies would enjoy the "flexibility to build a workable [gateway] network." 714 F. Supp. at 4, 18.

In response to the district court's waiver ruling, Bell Atlantic's telephone subsidiary in Pennsylvania designed a statewide gateway system. To serve the entire state economically, the system contemplated that a single gateway processor (the component that provides the system's directory assistance function) would be located in the Philadelphia LATA. The central processor was to be connected to local gateway equipment in the other four Pennsylvania LATAs by private long-distance lines leased

from an independent long-distance carrier. The alternative to this centralized gateway architecture—placing a separate costly processor in each of the state's LATAs—would be needlessly inefficient.

Bell Atlantic's provision of gateway directory service parallels its handing of "411" directory assistance.[3] The centralized gateway processor provides a welcome screen to acknowledge that the user has reached the gateway—just as an operator's voice greets a traditional directory assistance user by asking "What city, please?" The processor then provides a listing of information providers accessible through the gateway. When the user selects a remote information provider, the central processor directs the local gateway equipment to set up a separate call to the information provider using a long-distance carrier of the information provider's choice. No long-distance facility either owned or leased by Bell Atlantic is involved in that connection.

D. Proceedings in the District Court

In response to a challenge by MCI, and relying on the district court's 1983 interpretation of the decree, Bell Atlantic asked the district court to confirm that its centralized gateway architecture would not violate the consent decree's interexchange services prohibition. The district court ruled, however, that "the gateway architecture Bell Atlantic is proposing would operate on an interexchange basis, and . . . it would therefore constitute an interexchange service prohibited by . . . the decree." App. 15a.

The district court acknowledged that its 1983 ruling had established that the decree does not prohibit a Bell

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[3] Bell Atlantic, under the terms of the decree, is responsible for decree violations of its subsidiaries. Accordingly, this petition refers, in shorthand manner, to Bell Atlantic as the provider of gateway service although, strictly speaking, the service is provided by Bell Atlantic's Bell of Pennsylvania subsidiary.

company from engaging in other authorized businesses, including voice directory assistance, on an "interexchange basis." App. 15a-16a. Although that ruling had been predicated expressly on the terms of the decree—the court having held that long-distance facilities used by a Bell company to communicate with its own customers were not offered "for hire" within the meaning of the interexchange services prohibition—the district court now recharacterized its 1983 ruling. According to the court, the ruling embodied, not an interpretation of the prohibition, but rather a "strictly limited" "exception" (App. 16a n.17) intended to apply only to traditional telephone services. App. 17a-18a.

The court explained that it had permitted an exception only for communications "between the company and its customers that are necessary to run the telephone system." App. 16a. The exception was appropriate, according to the court, because services such as directory assistance were "an inherent part of the provision of [local] exchange communications," and those services "had always been provided" over long-distance lines. App. 17a. In contrast, the court stated, "the information generated by the centralized processor" in Bell Atlantic's gateway "is not an inherent part of any service being legitimately provided by the Regional Companies." App. 18a. Instead, it constitutes "the heart of a new and competitive service" that is "unrelated to the role of these companies in providing their basic, monopoly exchange service." *Id.*[4]

The court reasoned that the long-distance facilities used by Bell Atlantic to deliver its centralized gateway serv-

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[4] The court also criticized the proposed gateway as "simply an effort to reduce the cost of providing a new service." App. 17a n.20. It made no effort to harmonize this criticism with its 1987 and 1988 conclusions that the Bell companies would be permitted "flexibility" in implementing their gateway services so that these services could be offered at "affordable prices." See *supra* p. 6.

ices would be offered "for hire," because the cost of those facilities "would be recovered through [the] company's overall rates for gateway services." *Id.* Although the same can be said of voice directory assistance and other services permitted by the court's 1983 ruling, the court sought to distinguish such services on the ground that gateway customers "would interact with the centralized processor far more extensively than would a subscriber calling directory assistance." App. 19a. It did not explain how the extent of such interaction affected whether the long-distance facilities were offered "for hire."

Finally, the district court justified its decision on the ground that the "attitude" of some of the Bell companies has been to use the court's interpretations of the consent decree as "building blocks" to seek further orders that would "allow them to enter the prohibited realm of interexchange services." App. 20a, 21a. To permit a centralized gateway architecture, according to the court, would "invite further movement on the slippery slope," risking "erosion of the interexchange restriction." App. 21a.

In response to a subsequent motion for clarification, the district court ruled, without explanation, that the decree does *not* prohibit Bell Atlantic's use of long-distance facilities to provide centralized technical assistance, billing, and other administrative functions associated with its gateway. App. 22a.[5] Under the district court's reading

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[5] The technical assistance service allows customers who experience difficulty while using the gateway service to obtain assistance from an operator, a function that may involve lengthy interaction between the customer and the operator. Bell Atlantic uses long-distance facilities provided by an independent carrier to centralize the technical assistance function.

Similarly, Bell Atlantic uses long-distance facilities provided by an independent carrier to remotely monitor the gateway processor, network, and software, and to transmit billing verification information to and from computer centers located in Ohio and Kansas.

The long-distance costs incurred in providing these services, like those that would have been incurred in transmitting gateway directory assistance information to a remote customer, are recovered in Bell Atlantic's overall charge for gateway services.

of the decree, therefore, Bell Atlantic is forbidden to centralize the gateway directory assistance function—"the heart of the gateway service" (App. 14a)—but is free to centralize the gateway's support and administrative functions. The decree itself, however, makes no such distinctions.

E. Proceedings in the Court of Appeals

The court of appeals affirmed.[6] Like the district court, the court of appeals concluded that, "when information services are, as here, bundled with leased interexchange lines, the activity is covered [and prohibited] by the decree." App. 8a. The court claimed that, to hold that the long-distance facilities used by Bell Atlantic to deliver its centralized gateway service are not offered "for hire" would "create an enormous loophole in the core [interexchange] restriction of the decree." *Id.*

The court of appeals, on the other hand, did not contend that Bell Atlantic's position in this case is inconsistent with the district court's 1983 interpretation of "for hire." However, instead of honoring that contemporaneous construction, the court of appeals simply discarded it—although none of the parties to the appeal had suggested the 1983 interpretation was invalid. Noting that "the district court's interpretation of the consent decree is subject to *de novo* appellate review," the court of appeals rejected as "false" the premise that "we are somehow bound by the reasoning of the district court," even when that court's order has been "summarily affirmed by the Supreme Court." App. 9a. Although the court of appeals did not quarrel with the *result* reached by the district court in 1983, it treated the ruling as one

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[6] As the court of appeals held (App. 6a-7a), it had jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291.

grounded more in "pragmatism" than in "logic," thereby both nullifying its precedential effect and endorsing the district court's administration of the decree on the basis of non-textual, *ad hoc* "pragmatic" assessments. App. 10a.

The court of appeals acknowledged that the expense of placing a separate gateway processor in every LATA might preclude Bell Atlantic from providing any gateway service at all in rural areas. *Id.* It was not troubled by that result, however, because it believed that the district court would have discretion to authorize implementation of Bell Atlantic's proposed gateway architecture under a case-by-case waiver process (*id.*), although it also noted that this "process can be time-consuming and onerous." App. 7a.[7]

The court of appeals subsequently denied a timely petition for rehearing and suggestion for rehearing en banc. App. 23a, 24a.

REASONS FOR GRANTING THE WRIT

An Article III court enforcing a consent decree must anchor its orders within the four corners of the decree's text and must interpret that text consistently and predictably. Were it otherwise, the decree would be tantamount to a roving mandate to formulate and execute a judicial version of regulatory policy.

This case illustrates the problem: the district court, unrestrained by the court of appeals, has exceeded its judicial role. Rather than enforce the decree's language,

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[7] The district court requires all waiver requests to be submitted first to the Department of Justice. After the Department makes a recommendation to the court, the matter is open to comment by any interested person, whether or not a party to the decree. No time limits have been established for these procedures, and many waivers remain pending without decision for a year or more—in some cases as long as five years—a period that exceeds the life of many new computer-based services.

the district court has elected to expound telecommunications policy, treating the decree as a constitution rather than a contract.

The judge-made policy of the lower courts seems to be that no Bell company should ever *provide* long-distance service and, in order to assure the permanence of this restriction and to avoid a "slippery slope" which might permit a Bell company to enter the long-distance field by incremental steps, even the settled meaning of the text of the decree which permits the Bell companies to *use* long-distance service can justifiably be subverted. The district court attempted to do so by reinterpretation of the decree and its earlier opinion; the court of appeals affirmed by ignoring the text of the decree and repudiating the district court's earlier decision.

This chaotic result robs the pivotal decree language of its settled meaning, effectively conferring on the lower courts untethered discretion to achieve whatever outcome may suit them in a particular instance. In place of a stable charter to guide their business conduct, the Bell companies must now negotiate a hazardous minefield of unpredictable restrictions that have no basis in the decree and that threaten to impede the efficient deployment of computer-age telecommunications services. The net result is an expansion of the lower courts' supervision of this industry far beyond the Article III bounds on judicial power.

I. THE LOWER COURT DECISIONS, BY ABANDONING THE TEXT OF THE AT&T CONSENT DECREE'S PROHIBITION AGAINST OFFERING LONG-DISTANCE SERVICES "FOR HIRE," ARE IN CONFLICT WITH *ARMOUR* AND *ATLANTIC REFINING*

"[T]he scope of a consent decree must be discerned within its four corners . . . ." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). That rule reflects both

considerations of due process and sensitivity to the limited function of Article III courts. First, because the parties to a decree "waive[] [their] right to litigate the issues raised, a right guaranteed . . . by the Due Process Clause, the conditions upon which [they have] given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written . . . ." *Id.* Second, an Article III court supervising a consent decree's administration derives its lawful authority solely from the text of the decree itself. A court that interprets that text loosely to achieve its own vision of sound policy, instead of strictly implementing the parties' specific agreement, exceeds its Article III powers and exercises functions reserved to the political branches.

Implicit in *Armour's* "four corners" rule is the principle that interpretations of a consent decree must be consistent and predictable. Only then will the conduct of the parties be governed by the "precise terms" to which they agreed (*id.* at 681), rather than by the court's independent view of appropriate public policy. In *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959), this Court rejected the government's proposed interpretation of a consent decree, even though arguably more compatible with the underlying statutory purposes, in part because that interpretation "cannot be reconciled with the consistent reading given to the decree" by the parties during the 16 years of its existence. *Id.* at 22. That reasoning applies with even greater force where, as here, a "consistent reading" of the decree is grounded not only in seven years of behavior of the parties but also in an authoritative and contemporaneous construction by the supervising court itself.

Neither the district court nor the court of appeals heeded these fundamental rules of decree administration in this case. No coherent principle grounded in the text of the decree can reconcile the lower courts' unpredict-

able, *ad hoc* results. If Bell Atlantic's use of long-distance facilities to provide both "411" voice directory assistance and gateway technical assistance is *not* an offering of long-distance services "for hire," there is no textual basis for concluding that its similar use of long-distance facilities to provide gateway directory assistance *is* an offering of long-distance services "for hire."

II. THE PLAIN TERMS OF THE AT&T CONSENT DECREE BAR ONLY THE SALE, NOT THE USE, OF LONG-DISTANCE SERVICES

There is no question that Bell Atlantic proposed to use long-distance lines to communicate gateway information across LATA boundaries. Nor is there any question that Bell Atlantic offers gateway services for hire. But it is a *non sequitur* to conclude, as the lower courts did, that the company therefore would offer *long-distance* services for hire.

The parties to the decree defined the interexchange services prohibition to reach only the offering of long-distance services "for hire." They chose that phrase because of its recognized meaning as a "holding out" to the public of common carrier services. The Communications Act of 1934, for example, defines "common carrier" as "any person engaged as a common carrier *for hire*." 47 U.S.C. § 153(h) (emphasis added). "A common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (footnote omitted) (quoting *Industrial Radiolocation Service*, 5 F.C.C. 2d 197, 202 (1966)).

Neither in its "411" service nor in its gateway service does Bell Atlantic hold itself out to the public as a long-distance common carrier for hire. It simply employs long-

distance lines for its own utility in communicating economically with its customers.

Bell Atlantic's position is therefore comparable to that of a law firm using long-distance service to communicate with its clients. At oral argument before the court of appeals, the United States conceded that, even if a law firm separately records and bills for the long-distance telephone calls it makes to clients, it is not providing an interexchange telecommunications service "for hire." As the government lawyer explained, the law firm is not providing an interexchange service "[b]ecause what you had for hire was your legal services," and use of the telephone is only "incidental to the legal services that you are providing." Tr. at 19. "When a client calls you, they are not hiring you to use the telephone"; they are hiring legal services. *Id.*

In other contexts, this Court has recognized that a company may transport its own goods across state lines for sale to its customers without thereby providing interstate transportation "for hire." In *Red Ball Motor Freight, Inc. v. Shannon*, 377 U.S. 311 (1964), for example, the governing statute provided that "no person shall engage in any for-hire transportation business by motor vehicle" in interstate commerce, except with the authorization of the Interstate Commerce Commission. A business enterprise transported livestock and other commodities in its own trucks from its place of business in San Antonio, Texas, for delivery to its customers in Louisiana. It then purchased sugar in Louisiana and "backhaul[ed]" it "for resale to customers in San Antonio." *Id.* at 312.

The ICC had ruled that the "backhaul" operation was " 'conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required.' " *Id.* at 313. This Court disagreed,

concluding that the transportation component of the company's operation was "within the scope, and in furtherance, of [its] primary general mercantile business enterprise." *Id.* at 321. It made no difference that the price charged for the sugar covered the cost of transporting it from Louisiana to Texas, *see id.* at 322-23 (White, J., dissenting), because the company was selling sugar, not transportation.

The analysis here is even easier because Bell Atlantic did not seek to use long-distance lines to resell information of other providers. The gateway directory information Bell Atlantic is selling is its own "livestock," not somebody else's "sugar."

That was the theory on which the district court predicated the ruling in 1983, when the court considered it "obvious" that long-distance communications between a Bell company and its own customers—including those, like "411" directory assistance, for which a charge was assessed—did not amount to an offering of long-distance service "for hire" under the terms of the decree. 569 F. Supp. at 1100. It was also the view shared by all the parties to the decree at the time. All the parties to the decree agreed that a Bell company's *use* of long-distance lines to communicate with its own customers did not constitute an offering of long-distance service "for hire."

The district court and the court of appeals departed from this 1983 interpretation but provided no textual basis for doing so. The district court, denying that its earlier ruling constituted an interpretation of "for hire," proclaimed it retrospectively an "exception" to the decree's terms, intended only to authorize traditional telephone service arrangements. App. 16a-18a. The court of appeals expressly repudiated the "logic" of the 1983 ruling, although it saw no reason to disturb the *result* of that ruling (nor to disturb the ruling in the present case regarding customer technical assistance and the other gateway functions that the district court agrees *can* be

centralized under the decree). The court of appeals was satisfied to recharacterize the 1983 ruling as a permissible discretionary action grounded in "pragmatism." App. 10a.

But nothing in the 1983 ruling or in the terms of the decree itself supports the notion that the district court's interpretation of "for hire" either was or could legitimately have been based on anything but a logical construction of the text. The decree has specific provisions for waiving or modifying its restrictions, *see* §§ VII, VIII(C) (App. 35a-36a), but the district court cannot simply pronounce "exceptions." To discard a prior interpretation by labeling it an "exception" has the practical effect of disengaging the lower courts from the constraining text of the decree, allowing them to exercise on an *ad hoc* basis powers far more expansive than those contemplated by the parties or envisioned by this Court in *Armour*.

Equally untenable is the court of appeals' notion that this departure from the decree's text is curable because Bell Atlantic could seek a waiver of the newly-expanded restriction. App. 10a. The decrees in *Armour* and *Atlantic Refining* were also subject to being modified under specific standards, 402 U.S. at 674-75 & n.2, 676; 360 U.S. at 23, but this Court required those decrees to be interpreted consistently and according to their text.[8]

At bottom, both the district court and the court of appeals abandoned the decree's text and the 1983 interpretation on the ground that Bell Atlantic's reading would open a "loophole" in the long-distance restriction (App. 8a) that would "invite further movement on the slippery slope" toward "erosion of the interexchange restriction."

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[8] Moreover, requiring a waiver for every new service that is provided through centralized facilities would only expand the lower courts' already extended role in overseeing the day-to-day operation of the nation's telecommunications industry.

App. 21a. The obligation of the lower courts, however, is to construe correctly and consistently the text to which the parties agreed. The 1983 interpretation of "for hire" is not a "loophole"; it is the heart of the bargain carefully crafted by the parties for separating long-distance carriage from local exchange service while, at the same time, preserving the opportunities for efficient integration of local operations. Any other arrangement would have atomized the provision of local telephone service among 160 stand-alone companies, a result which even the district court still frankly concedes is "absurd." App. 17a.

III. THE CASE WARRANTS PLENARY REVIEW

This case is important not only because the rulings below will have an adverse effect on the ability of consumers to obtain low-cost gateway services and other advanced communications services that undoubtedly will evolve in the future, but also because the rulings are symptomatic of the gradual breakdown of coherent judicial administration of this consent decree. The district court, with the support of the court of appeals, has taken on a function alien to its proper Article III role. Instead of interpreting the decree by reference to the words found within its four corners, the district court has increasingly strayed from the text, resting its rulings on considerations of public policy not found in the decree itself. In the process, it has undermined the predictability of the decree and has assumed the role of telecommunications policy regulator—a role assigned under the constitution to the political branches and forbidden to the judicial branch.

When this Court summarily affirmed the district court's entry of the consent decree, three Justices dissented. *Maryland v. United States*, 460 U.S. 1001 (1983) (dissenting opinion of Justice Rehnquist, joined by the Chief Justice and Justice White). The dissenting Justices expressed concern even at that early point over the

district court's administration of the decree and noted, quoting from *Green v. Frazier*, 253 U.S. 233, 240 (1920), that " '[q]uestions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other branches of government.' " 460 U.S. at 1006.

The concerns expressed by the dissenting Justices are at the heart of this case as well. In the hands of the district court, the decree has become a tool for invasive judicial regulation of the telecommunications industry.

This Court's recent denial of review in *MCI Communications Corp. v. United States*, 59 U.S.L.W. 3277 (Oct. 9, 1990) (No. 90-9), makes review in the present case all the more imperative. The court of appeals in that case ruled that the district court applied an improper standard in rejecting the Bell companies' unopposed motion to lift the decree's information services restriction. *United States v. Western Electric Co.*, 900 F.2d 283, 305-08 (D.C. Cir. 1990). The consequence, as the panel in the present case recognized, is that "information services . . . may well shortly be removed from the decree's coverage." App. 8a. Yet, if the present judgment is allowed to stand, the Bell companies will be perversely foreclosed from providing such information services efficiently. Instead of centralizing the service and delivering it economically over long-distance lines to their own customers, the Bell companies will have to set up separate facilities within each LATA—an architecture that the district court admits would be "absurd" in the case of telephone service. This will effectively negate both the advantages of centralization, which the decree was designed to preserve, and the benefits of increased competition in information services markets, which lifting the restriction would otherwise promote.

This Court has not previously granted plenary review in any case involving the administration of the AT&T

consent decree. It should do so here both to correct the erroneous interpretation of this decree and to mark more clearly the boundaries of proper judicial supervision of consent decrees generally.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 3, 1990 Decided June 12, 1990

No. 89-5034

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

BELL ATLANTIC,

Appellant

No. 89-5075

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

U.S. WEST, INC.,

Appellant

No. 89-5076

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

PACIFIC TELESIS GROUP,
Appellant

No. 89-5077

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant

No. 89-5078

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

BELLSOUTH CORPORATION,
Appellant

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 82-00192)

Before: EDWARDS, SILBERMAN and WILLIAMS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This appeal is yet another in a stream of disputes arising from the consent decree that purported to settle the Justice Department's antitrust suit against AT&T. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Bell Atlantic, joined by several other Regional Bell Operating Companies (BOCs), challenges the district court's declaratory ruling that the system by which Bell Atlantic proposed to provide so-called "gateway services" to its customers seeking information about and connection to information services providers would violate the consent decree's line of business restrictions. *See United States v. Western Elec. Co.*, 1989-1 Trade Cas. (CCH) § 68,400 (D.D.C. 1989). We affirm.

I.

Under the consent decree, AT&T divested itself of its local exchange monopoly, transferring those operations to the BOCs. In turn, the decree barred the BOCs from participating in the markets for interexchange (long distance) services, equipment manufacturing, information services, and all other non-telecommunications businesses. *See AT&T*, 552 F. Supp. at 227-28. In 1987, in the first so-called "Triennial Review" of the continuing need for

those line of business restrictions, the BOCs sought removal of all of the prohibitions. The district court granted their motions with respect to non-telecommunications businesses, denied the motions seeking removal of the interexchange and manufacturing restrictions, and partially lifted the information services restriction in order to allow the BOCs to transmit information generated by others and to provide gateway services—a variety of functions designed to foster interconnection between consumers and information providers. *See United States v. Western Elec. Co.*, 714 F. Supp. 1, 23 (D.D.C. 1988); *United States v. Western Elec. Co.*, 673 F. Supp. 525, 592-94 (D.D.C. 1987). On appeal, while affirming all of the district court's other rulings, we remanded the BOCs' information services motion to the district court for reconsideration under a legal standard more favorable to the BOCs. *See United States v. Western Elec. Co.*, No. 87-5388 et al., (D.C. Cir. Apr. 3, 1990) (per curiam).[1]

The BOCs, therefore, are permitted to provide gateway information services so long as they do not run afoul of the decree's still-extant interexchange restriction. The contours of that restriction are established by three sections of the consent decree. Section II(D)(1) of the decree provides that, "no BOC shall . . . provide interexchange telecommunications services . . . ." 552 F. Supp. at 227. "Interexchange telecommunications," according to section IV(K), are "telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." *Id.* at 229. Finally, "telecommunications service" is defined by section IV(P) of the decree as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." *Id.*

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[1] There is thus no reason to doubt that the BOCs will continue, at minimum, to be able to provide gateway services.

After the district court issued its opinions in the Triennial Review, Bell Atlantic announced its plans to deploy a gateway system in Pennsylvania designed as follows. A customer in any of Pennsylvania's five local exchange areas (sometimes called "LATAs") wanting to connect his computer to information services providers (ISPs) would dial a local telephone number to reach Bell Atlantic's facility (referred to as its "PAP") in that local exchange area. Bell Atlantic would then connect the call to a central processor located in Philadelphia,[2] utilizing interexchange lines leased from an interexchange carrier. The central processor would then perform the primary gateway functions. It would transmit to the caller an introductory welcoming screen and a "White Pages-style" listing of information services providers. The customer would also be able to search through the central processor's files to obtain listings of providers of specific services, descriptions of provider services, and prices. If the customer ultimately decided to patronize an ISP, the central processor would transfer the call back to Bell Atlantic's PAP within the customer's LATA, and the PAP would connect the customer to the ISP, thus ending the involvement of Bell Atlantic's gateway. If the ISP were located in a different LATA from the customer, the call would be routed by the PAP to the ISP through an interexchange carrier of the ISP's choosing. The customer would be charged one "bundled" price for these gateway services—that is, he would not be charged separately for any interexchange service used to transmit his call across LATA boundaries to reach the central processor in Philadelphia.

After appellee MCI, among others, objected to Bell Atlantic's proposed gateway architecture, Bell Atlantic asked the district court for a declaratory ruling that the

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[2] Of course, if the call originated in the Philadelphia LATA, such inter-LATA transmission would not be necessary.

gateway would not violate the degree's interexchange restriction. The district court ruled against Bell Atlantic, and this appeal followed.

II.

Appellees AT&T, MCI, and BT Tymnet argue that we lack jurisdiction over this appeal because Bell Atlantic did not seek a waiver, pursuant to section VIII(C)[3] of the decree, that would allow it to provide the proposed gateway services. Under their view, the district court's opinion was not an appealable final order since Bell Atlantic may still obtain the very same practical relief, by applying for and being granted a waiver, that it sought in its motion for a declaratory ruling. We believe that the district court's decision is a final order under 28 U.S.C. § 1291 and that the BOCs need not use the waiver procedure in order to get appellate review of the district court's ruling.

If, as appellants contend, Bell Atlantic's proposed gateway does not contravene the decree's restrictions, then the district court's ruling obliges Bell Atlantic either to abandon a lawful activity or to seek a waiver when one should not be required. According to the procedure established by the district court in 1984, waiver requests under this consent decree must first be submitted to the Justice Department, and if the Department is convinced that the BOC request satisfies the section VIII(C) standard, it requests an appropriate order from the court. *See United States v. Western Elec. Co.*, 592 F. Supp. 846, 873 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). But the availability of a waiver procedure cannot oblige the BOCs to invoke it before they appeal a district court ruling forbidding behavior that they believe

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[3] Section VIII(C) provides: "The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *AT&T*, 552 F. Supp. at 231.

the decree authorizes without the approval of the Justice Department, the district court, or anyone else. *Cf. WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) ("The very essence of waiver is the assumed validity of the general rule. . . ."). The BOCs may choose not to go through the waiver process—either as a matter of strategy or because the process can be time-consuming and onerous—and simply assert their perceived rights under the decree. We therefore conclude that this appeal is properly before us.

III.

The merits of this dispute turn on the interrelationship of the definition of interexchange telecommunications—"telecommunications between a point or points located in one exchange . . . and a point or points located in one or more other exchange areas or a point outside an exchange area"—and the definition of telecommunications service—"the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." Because the decree provides that "no BOC shall . . . provide interexchange telecommunications services," Bell Atlantic's proposed gateway service is prohibited only if it satisfies both definitions. Appellants argue that the *interexchange portion* of the gateway service is not offered for hire and therefore the proposal is not covered by the decree. In other words, it is claimed that so long as the interexchange portion of the service is not separately identified to the customers and not separately charged to the customer, it is not offered for hire even though it is bundled in the overall gateway service, which is clearly offered for hire.

We think appellants urge a rather strained interpretation of the language of the decree. Under their view, interexchange service, no matter how extensive, could be provided by the BOCs simply packaging that service with some other noninterexchange telecommunications or even nontelecommunications service. That interpretation,

it seems rather obvious, would create an enormous loophole in the core restriction of the decree. To be sure, information services, of which the gateway proposal appears to be a variant, may well shortly be removed from the decree's coverage, *United States v. Western Elec. Co.*, No. 87-5388 et al., slip op. at 46-55 (D.C. Apr. 3, 1990) (per curiam). Nevertheless, when information services are, as here, bundled with leased interexchange lines, the activity is covered by the decree.[4] We do not agree with appellants that a distinction should be drawn between leasing lines, on the one hand, and acquiring or constructing them, on the other. A taxi company, for instance, offers taxis service for hire whether or not it owns or leases its cabs. The critical distinction under the decree is not whether the BOC owns the interexchange capacity, but whether it "provide[s]" interexchange service to its customers.

Appellants rely heavily on a 1983 ruling of the district court, *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1097-1101 (D.D.C.), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983), that permitted BOCs to provide directory assistance service to customers even though that service entails transmission of certain calls across LATA boundaries. It is argued that no principled distinction can be drawn between that service and the gateway service.

The 1983 decision followed the district court's review, pursuant to the consent decree, of AT&T's plan of reorganization under which the pre-divestiture assets and functions of AT&T were divided among the BOCs and AT&T. In that context, the district court discussed so-called "official services"—those communications that oc-

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[4] We do not address the decree's coverage of interexchange service (such as "800" service) that a BOC might offer, incidental to some permissible business and "provided" to the BOC by others (*i.e.*, interexchange carriers). Appellants have not argued that the BOCs are not "providers" here.

cur within a BOC, as well as those between a BOC and its customers, that are regarded as necessary to run the telephone system. Included among those communications was the traditional directory assistance service offered to customers. *See id.* at 1097 n.175. Not surprisingly, the facilities utilized by the pre-divestiture Bell System for official services were designed to achieve operational efficiencies and without regard to the LATA boundaries subsequently imposed by the decree. Therefore, if those facilities were still to be used for official services after divestiture, many communications, including directory assistance calls between customers and the BOCs, would cross LATA boundaries. The district court rejected as "illogical" and "unwise" AT&T's proposal that the relevant facilities should be allocated to AT&T in the breakup thereby requiring the separated BOCs either to create a self-contained operating company within each LATA or to hire from AT&T (or another interexchange carrier) facilities that it needed to operate the local telephone companies. *See id.* at 1097-1100. Instead, the district court held that, consistent with the decree, the BOCs could own and operate inter-LATA facilities "which are user solely or predominantly for the performance of its own Official Services functions." *Id.* at 1101. In the course of explaining why the decree's terms did not bar its decision, the district court stated that, "[o]bviously, the Official Services are not 'for hire.'" *Id.* at 1100.

Appellants, in making this argument, rely on a false premise: that we are somehow bound by the reasoning of the district court. That is not so—even for district court opinions that are summarily affirmed by the Supreme Court. *See Anderson v. Celebrezze*, 460 U.S. 780, 785 n.5 (1983). Indeed, as we have repeatedly stated, the district court's interpretation of the consent decree is subject to *de novo* appellate review. *See, e.g., United States v. Western Elec. Co.*, No. 87-5388 et al., slip op. at 23 (D.C. Cir. Apr. 3, 1990) (per curiam). Therefore, assuming *arguendo* that the district court meant in 1983 to refer to

directory assistance as well as other official services when it summarily stated without elaboration that such services were not "for hire," [5] we are certainly not obliged to accept that interpretation. In 1983 the district court was faced with a one-time daunting task, the allocating of existing facilities to either AT&T or the BOCs—and the court and the parties may well have preferred a measure of pragmatism to logic.[6]

* * * *

Appellants have picked a rather attractive vehicle to test their interpretation of the decree. We are told that if the gateway service were to be duplicated in every LATA, it would be prohibitively expensive and therefore if Bell Atlantic may not offer it throughout Pennsylvania it might not be available anywhere. That is a powerful argument for a waiver from the terms of the decree, but that is a route appellants chose to bypass. For the foregoing reasons, the judgment of the district court is affirmed.

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[5] In the paragraph immediately preceding the "for hire" statement, the district court notes that the decree's interexchange restriction "is wholly inapplicable to the provision of inter-LATA service by each Operating Company for its own *internal*, official purposes." *Id.* at 1100 (emphasis added) (footnote omitted).

[6] We do not think much of the entirely different argument presented by intervenor U.S. West: that Bell Atlantic's proposed gateway is permitted by the decree since it constitutes "information access" as that term is used in section IV(I), rather than an "information service." We are not sure why that distinction should make any difference since the decree expressly states that information access services may be provided by the BOCs "in an exchange area." Bt that as it may, the service at issue here is clearly not "information access" since the decree states that information access is provided "to or from the facilities of an information provider." The connection between a customer and Bell Atlantic's central processor obviously does not fit that description. The gateway services that we are focused on in this appeal would be completed before the customer is connected to an information provider.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 82-0192(HHG)

UNITED STATES

v.

WESTERN ELECTRIC CO., INC., *et al.*

Filed January 24, 1989

OPINION

GREENE, D.J.: In its Opinions of September 10, 1987 and March 7, 1988, the Court removed so much of the line of business restrictions in the decree [1] as to permit the Regional Companies to engage in the transmission of information services.[2] By virtue of those decisions, the Regional Companies were allowed, *inter alia*, to own and operate gateways.[3] The Court emphasized, however, that

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[1] Section II(D) of the decree. See *United States v. AT&T* [1982-2 TRADE CASES ¶ 64,979], 552 F. Supp. 131, 227-28 (D.D.C. 1982).

[2] *United States v. Western Electric Co.* [1987-2 TRADE CASES ¶ 67,815], 673 F. Supp. 525, 587-97 (D.D.C. 1987); *United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C. 1988).

[3] A gateway is part of the infrastructure necessary for the transmission of information services. It is accessible by customers who may dial a local telephone number and through the gateway achieve a useful and informative connection with the actual providers of information. The gateways perform such functions as address translation, data transmission, protocol conversion, billing management, and introductory information content. 673 F. Supp. at 592.

the newly-established authority for the Regional Companies "did not modify the interexchange prohibition of the decree when it allowed Regional Company participation in the transmission of information services." [4] A request now before the Court implicates these decisions.

I

Bell Atlantic [5] has filed a motion for a declaratory ruling [6] that gateway architecture it proposes to deploy [7] does not offend the decree restrictions as modified last year. That architecture consists basically of two parts: (1) so-called PAPs,[8] each to be located in and serving one of the five LATAs n Pennsylvania, and (2) a single central gateway "processor," to be located in the Philadelphia LATA to serve the entire system without regard to LATA boundaries. The system would work as follows.

Customers seeking to use a Bell Atlantic gateway for achieving access to information services would dial a local telephone number to reach a PAP in their own LATA. The PAP, in turn, after performing relatively limited functions (see *infra*), would then turn the customer and his inquiry over to the central processor which would perform a number of other functions in order to attain

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[4] *United States v. Western Electric Co.* [1988-1 TRADE CASES ¶ 68,094], 690 F. Supp. 22, 28 (D.D.C. 1988).

[5] Other Regional Companies, e.g., US West, are supporting the Bell Atlantic motion, and could be expected to follow the Bell Atlantic lead with respect to implementation if the motion is granted.

[6] The motion is opposed primarily by the Department of Justice and by MCI.

[7] For the time being, there would be only one system to serve the Pennsylvania area. If the Pennsylvania experiment is a success, presumably Bell Atlantic, and other Regional Companies, would extend the architecture on a nationwide basis.

[8] PAP is an abbreviation for what Bell Atlantic calls a protocol agile packet assembler-disassembler.

the contact between the customer and the information he seeks.

As indicated, the issue before the Court is whether this system violates the line of business restrictions of the decree. That issue may appropriately be divided into two questions: (1) does the process proposed by Bell Atlantic represent the performance of an interexchange service prohibited to the Regional Companies by the decree, and (2) if the answer is in the affirmative, may the Regional Companies nevertheless perform the functions comprising the process on the basis that it constitutes Regional Company "official services"? [9]

II

[*Interexchange Services*]

The question whether gateway services such as those contemplated by Bell Atlantic constitute prohibited interexchange services was first presented to the Court by MCI in connection with the Court's reconsideration of several questions following the so-called triennial review. Noting the absence of a full factual record and briefing, the Court declined to rule on the issue at that time.[10] Based on the facts now presented, and upon consideration of the briefs of all the interested parties, the Court concludes that the Bell Atlantic proposal would, if implemented, violate the decree prohibition on interexchange services.

Section IV-K of the decree defines "interexchange telecommunications," insofar as here relevant, as telecommunications between a point or points in one LATA and a point or points located in another LATA.[11] In general,

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[9] *United States v. Western Electric Co.* [1983-2 TRADE CASES ¶ 65,756], 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983).

[10] 690 F. Supp. at 29.

[11] Section IV-P of the decree defines "telecommunications service" as the offering for hire of telecommunications facilities or of telecommunications by means of such faiclities. 552 F. Supp. at 229.

therefore, when a call, transmission, or service crosses LATA boundaries, it is interexchange in character, and as such, under section II(D)(1) of the decree, it is reserved to the interexchange carriers (e.g., AT&T, MCI, US Sprint) and prohibited to the Regional Companies. It is difficult to see on what basis it could seriously be contended that, in view of the decree definitions, the proposed Bell Atlantic operation is not an interexchange service.[12]

In every sigfinificant respect, it would be the central, multi-LATA processor, not the local PAP, that would be the information services gateway. The local PAP would do little more than to determine the characteristics of the customer's terminal before connecting him to the processor for the performance of all the necessary gateway functions. These would include, *inter alia*, the provision to the customer of a "welcome page" screen, a "menu" listing of the various available information service providers, an index of specific services with a listing of the providers of the services, and the network "intelligence" supporting these services. The customer would communicate to the central processor the name of the information service provider he wished to access, and once that was accomplished the central processor would direct the PAP to connect the customer to that provider, and it would then disconnect its link to the PAP.

It is apparent from this summary description that the central processor is the keystone of the proposal, and that the information and the services at the heart of the gateway service would be provided by that processor.[13] How-

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[12] Indeed, it could not reasonably be contended that the interexchange portion is a mere incidental or auxiliary part of the whole (although even if this were so, the service would still not be allowable to the Regional Companies under the decree).

[13] In its June 1988 Opinion, the Court said

> "If a subscriber is considered to have accessed the gateway upon achieving contact with the PAD, there would by defini-

ever, as noted above, the processor may be located in an entirely different LATA than the customer himself or the PAP, and it would perform its functions on an inter-LATA or interexchange basis.[14] On these bases, the conclusion is inescapable that the gateway architecture Bell Atlantic is proposing would operate on an interexchange basis, and that it would therefore constitute an interexchange service prohibited by section II(D)(1) of the decree.

III

[*Official Services*]

The inquiry as to the consistency of the proposed architecture with the decree does not end with the finding that the service involves interexchange services. Bell Atlantic contends that the transmission provided in the context of the gateway service does not violate the decree because it is analogous to the Regional Companies' provision of "official services" across LATA boundaries which this Court approved shortly after the breakup.[15] According to the Bell Atlantic motion, the proposed services, like the directory assistance arrangements, for exam-

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tion be no inter-LATA transmission and the Regional Companies could provide the service. On the other hand, if access to the network is found to occur only when the subscriber interacts with the gateway functions, stored in another LATA, an inter-LATA communication will have occurred."

690 F. Supp. at 29.

In the Bell Atlantic proposal, access to the network occurs when the customer interacts with the central processor.

[14] It is immaterial whether a Regional Company would provide the services directly or through use of facilities leased from interexchange carriers, for the decree prohibits these companies from providing interexchange *services*, not merely from engaging in interexchange transmissions. *United States v. Western Electric Co.*, 627 F. Supp. 1090, 1100-02 (D.D.C.), rev'd on other grounds [1986-2 TRADE CASES ¶ 67,234], 797 F.2d 1082 (D.C. Cir. 1986).

[15] 569 F. Supp. at 1098-1100.

ple, are not prohibited interexchange services because they are not offered "for hire," especially since the caller may be regarded as indifferent to their inter-LATA nature.[16]

While it is true that, in determining that certain communications between the Regional Companies and their customers were official services, the Court did consider whether the service was "for hire" and whether the customer cared where the systems were located, these factors were not cited as constituting the operative definition of official services.[17] The fundamental reason for the Court's approval of the provision by the Regional Companies of official services on a centralized basis was that these services comprise essentially those communications within an Operating Company and between the company and its customers that are necessary to run the telephone system.[18]

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[16] Bell Atlantic's Motion for a Declaratory Ruling Approving its Proposed Gateway Architecture, at 7 (October 7, 1988).

[17] The Court only said that the "strict terms of the decree" did not "require[]" prohibiting the Regional Companies from managing their own business through their own official services networks. 569 F. Supp. at 1100.

Indeed, if the Regional Companies' definition of "for hire" services or the customer's indifference were decisive, many services not regarded as official services by any rational definition could be so classified. For example, under that definition, the Regional Companies could offer any interexchange service, as long as the caller was connected only to the Regional Company, did not receive an unbundled bill, and therefore did not care where and how the call was routed. The official services exception—adopted for narrow, strictly limited "internal" purposes—would in the end swallow up the fundamental interexchange services restriction.

[18] The four categories of official service approved by the Court were:

> "(1) The Operational Support System Network . . . used by the Operating Company to monitor and control trunks and switches . . . .
>
> "(2) The Information Processing Network . . . used to transmit data relating to customer trouble reports, service orders,

The official services decision was made at the time the Court approved the AT&T plan of reorganization, recognizing that the official services were an inherent part of the provision of exchange communications within a Regional Company. The alternative would have been in effect to require a separate telephone company to be set up for each LATA—an absurd result.[19]

What also weighed heavily with the Court was that, since the official services had always been provided by the individual Operating Companies and the lines were already in place and functioning, to require these local companies

> to redesign their Official Services systems so that none of their internal communications crosses LATA boundaries . . . would result in a loss of the operational and cost efficiencies produced by the centralization which currently exists in the local phone system.[20]

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trunk orders from interexchange carriers, and other information necessary for carrying out the Operating Companies' businesses.

"(3) Service Circuits . . . used to receive repair calls and directory assistance calls from Operating Company customers . . . .

"(4) Voice communications . . . used by the Operating Companies for hundreds of thousands of calls relating to their internal businesses."

569 F. Supp. at 1098 n.179.

[19] 569 F. Supp. at 1099. To compare requiring entire telephone companies in every LATA to requiring disperse processors, as some of the Regional Companies do, is like comparing apples and oranges.

[20] 569 F. Supp. at 1099. No centralized gateway system is currently operating, and to prohibit the Regional Companies from providing this service would not destroy an operation that already exists. Bell Atlantic's proposal is simply an effort to reduce the cost of providing a new service in competition with others.

This reasoning highlights the differences between the contemplated gateway services and true official services. The information generated by the centralized processor is not an inherent part of any service being legitimately provided by the Regional Companies. It is not only entirely unrelated to the role of these companies in providing their basic, monopoly exchange service; it constitutes the heart of a new and competitive service. On that basis alone, the attempted analogy with "official services" has no reasonable basis.

As indicated, it is also argued that the proposed service is identical in concept to directory assistance, in that subscribers will merely obtain the necessary information about information providers and the link will then be disconnected. But directory assistance, too, was permitted as an inherent part of the Regional Company exchange service rather than as a separate information service to be provided in a competitive market.[21] See also, text to note 24, *infra*.

Moreover, even the "for hire" question weighs against Bell Atlantic's motion. The cost of the Bell Atlantic gateway private lines would be recovered through that company's overall rates for gateway services. To be sure, Bell Atlantic's customers would not receive an unbundled bill separately accounting for inter-LATA transmission but that is a distinction without a difference. They would be charged for the time they are connected to the distant processor. This approach would of course permit Bell Atlantic to require those subscribers who are located in the same LATA as the gateway to cross-subsidized the service with respect to its inter-LATA characteristics.

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[21] The FCC has noted that "[t]here are a number of existing gateway services, such as those of CompuServe Genie, and Prodigy, that presumably will compete with Bell Atlantic's gateway." FCC Gateway Order, ¶ 11, n.27.

Finally, the subscriber would interact with the centralized processor far more extensively than would a subscriber calling directory assistance. Subscribers would be able to search for providers of specific kinds of services, and they would be able to change the information they provided to the centralized processor at any point during their search.[22]

For all these reasons, the Court has consistently interpreted the official services exception narrowly. In 1983, Bell Atlantic, together with several of the other Regional Companies, sought clarification that time and weather services were official services and that their facilities could therefore cross LATA boundaries. The Court rejected the contention that these services were official services, stating that such a finding would set an undesirable precedent. The Court instead required and granted a waiver allowing the time and weather services to continue on a limited inter-LATA basis.[23] Similarly, the Court rejected a subsequent motion by Bell Atlantic to classify its provision of directory assistance service to customers of independent telephone companies as an official service. The Court decided once again that a waiver was required.[24] That principle applies here *a fortiori*.

The Court holds that the operation of a centralized gateway processor is not an official service.[25]

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[22] MCI's Response to the Court's November 10, 1988 Order, at 3, citing *In re The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services*, DA 88-1512, ¶¶ 3-4 and n.9 (FCC, released September 30, 1988).

[23] *United States v. Western Electric Co.* [1983-2 TRADE CASES ¶ 65,748], 578 F. Supp. 658, 661 (D.D.C. 1983).

[24] *United States v. Western Electric Co.*, Civil Action No. 82-0192, slip op. at 6 and n.9 (D.D.C. Feb. 6, 1984).

[25] Bell Atlantic also argues that its centralized information processor performs a routing function similar to that performed by the Regional Companies on a centralized basis in connection with 800

IV

[Department of Justice]

More than mere technical interpretations of the decree are involved.

1. Bell Atlantic derides the Department of Justice for its concern about the potential expansion of the communications between the centralized processor and subscribers in the following scornful words:

> The danger, apparently, is that the kids will sit there all night, just reading the menu—and once that occurs, Bell Atlantic will soon be claiming the right to put up interlata links to provide other information, similarly "unrelated" to exchange and exchange access services.[26]

If the past is any guide, that is precisely what is likely to happen. The history of the attitude of some of the Regional Companies toward the decree has been that judicial interpretations that loosen the strict and literal words of that document are mere building blocks toward yet further removals.[27]

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service. The centralized processor does provide information to the PAP to enable it to send calls to the proper information provider. Were this all it did, the 800 analogy might be apt. According to Bell Atlantic's own description, however, the centralized processor does much more than simply to route calls. As noted, it is the key to the entire service. In fact, of the components of the gateway system, it is the PAP rather than the centralized processor whose function is primarily to facilitate and route calls.

[26] Bell Atlantic Reply at 4 (November 2, 1988).

[27] *United States v. Western Electric Co.* [1984-2 TRADE CASES ¶ 66,121], 592 F. Supp. 848, 867 (D.D.C. 1984); see also, 673 F. Supp. at 545 (imprecise waivers of judicial orders cause Regional Companies to "nibble incessantly at the edges of the restrictions, in the expectation that this would result in their complete entry into the prohibited markets").

The Bell Atlantic sarcasm regarding the Department of Justice's comments is particularly inappropriate here in view of the Regional Company effort, in the very papers now under consideration, to construct from such poor materials as their authority to render directory assistance an edifice that will allow them in effect to enter the prohibited realm of interexchange services. Thus, the Court quite agrees with the Department: to construe the official services exception to encompass the proposed new service notwithstanding the considerations enumerated above would be to invite further movement on the slippery slope upon which the Regional Companies invite the Court to venture.

2. The Court has construed the decree to permit only a very limited entry of the Regional Companies into the area of information services. The Opinion permitting such entry recognized the potential for anticompetitive conduct,[28] and it expressly allowed the companies to provide only the information necessary to permit subscribers to select the information providers they wish to contact. And the Court emphasized shortly thereafter that it was not in any way modifying the interexchange prohibition of the decree when it allowed Regional Company participation in the transmission of information services. Moreover, the Court has emphasized again and again the reasons for guarding against the erosion of the interexchange restriction.[29] That is what is, at bottom, involved here.

For the reasons stated, the Bell Atlantic motion is Denied.

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[28] 673 F. Supp. at 592 ("It is obviously essential, however, that the necessary infrastructure components be defined with as much detail as possible in order to avoid conferring upon the Regional Companies the authority to market content-based information services, a result that would prohibitively increase the risk of anticompetitive conduct").

[29] See, e.g., 673 F. Supp. at 540-52.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

ORDER

[Filed Mar. 14, 1989]

Upon consideration of the responses filed by AT&T and MCI to Bell Atlantic's motion for clarification of the Court's opinion of January 24, 1989, and it appearing the relief requested in the motion for clarification is not opposed, it is this 4th day of March, 1989

ORDERED that Bell Atlantic's motion for clarification be and it is hereby granted; and it is further

ORDERED that the Court's order of January 24, 1989 permits Bell Atlantic to provide the internal billing activities and the technical and customer assistance functions described in Bell Atlantic's motion on a centralized basis.

/s/ Harold H. Greene
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5034

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Appellant

and Consolidated Cases

Before: Edwards, Silberman and Williams, Circuit Judges

ORDER

[Filed Aug. 28, 1990]

Upon consideration of the petition for rehearing of appellant Bell Atlantic, filed July 27, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5034

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Appellant

and Consolidated Cases

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed Aug. 28, 1990]

The Suggestion For Rehearing *En Banc* of appellant Bell Atlantic has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Ruth B. Ginsburg, D. H. Ginsburg, Sentelle and Henderson did not participate in this matter.

THE AT & T CONSENT DECREE

Excerpt from *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), as modified by *United States v. Western Elec. Co.*, 714 F. Supp. 1, 23 (D.D.C. 1988)

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such compliant denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parites and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendent AT & T shall submit to the Department of Jusitce for its approval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical in-

formation to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT & T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT & T by means of spin-off of stock of the separated BOCs to the shareholders of AT & T, or by other disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities.

B. Nothwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of con-

tact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT & T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT & T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I(A)(4), AT & T shall not acquire the stock or assets of any BOC.

II

BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT & T and its affiliates.

B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;

2. establishment and dissemination of technical information and procurement and interconnection standards,

3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modifica-

tion of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admis-

sion by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV

Definitions

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affilate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT & T has stock ownership, whether or not controlled by AT & T.

B. "AT & T" shall mean defendant American Telephone and Telegraph Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with, respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunica-

tions, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT & T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for any interexchange carrier. In the reorganization specified in section I, trunks used to transmit AT & T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area; in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transform-

ing, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fibreoptics) that transmit information by electromagnetic means or which directly support such trans-

mission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regarding compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

(a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

(b) advice that the BOC's legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

> The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States* v. *Western Electric* Modification of Final Judgment and a written directive setting forth Company policy regarding compliance with the antitrust laws and with such Modification of Final Judg-

ment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, BOC, or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant or BOC marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in

section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT & T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT & T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT & T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has

a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT & T from offering electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT & T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT & T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT & T. There is no connection between this company and AT & T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT & T.

G. Facilities and other assets which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT & T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT & T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

K. Notwithstanding the provisions of section IV(J):

1. The separated BOCs shall be permitted to engage in the transmission of information as part of a gateway to an information service, but not in the generation or manipulation of the content of information. "Transmission" shall mean the performance of the following functions: data transmission, address translation, protocol conversion, billing management, and introductory information content.

2. The separated BOCs shall be permitted to engage in voice storage and retrieval services, including voice messaging and electronic mail services.

3. In the performance of the services authorized herein, no BOC shall discriminate between and among providers of information or against other providers of information services or of voice storage and retrieval services.

APPENDIX A

Bell Telephone Company of Nevada

Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company

The Mountain States Telephone and Telegraph Company

The Ohio Bell Telephone Company

The Pacific Telephone and Telegraph Company

Wisconsin Telephone Company

APPENDIX B

PHASED-IN BOC PROVISION OF EQUAL EXCHANGE ACCESS

A. 1. As part of its obligation to provide non-discriminatory access to interexchange carriers, no later than September 1, 1984, each BOC shall begin to offer to all interexchange carriers exchange access on an unbundled, tariffed basis, that is equal in type and quality to that provided for the interexchange telecommunications services of AT & T and its affiliates. No later than September 1, 1985, such equal access shall be offered through end offices of each BOC serving at least one-third of that BOC's exchange access lines and, upon bona fide request, every end office shall offer such access by September 1, 1986. Nothing in this Modification of Final Judgment shall be construed to permit a BOC to refuse to provide to any interexchange carrier or information service provider, upon bona fide request, exchange or information access superior or inferior in type or quality to that provided for AT & T's interexchange services or information services at charges reflecting the reduced or increased cost of such access.

2. (i) Notwithstanding paragraph (1), in those instances in which a BOC is providing exchange access for Message Telecommunications Service on the effective date of this Modification of Final Judgment through access codes that do not permit the designation of more than one interexchange carrier, then, in accordance with the schedule set out in paragraph (1), exchange access for additional carriers shall be provided through access codes containing the minimum number of digits necessary at the time access is sought to permit nationwide, multiple carrier designation for the number of interexchange carriers reasonably expected to require such designation in the immediate future.

(ii) Each BOC shall, in accordance with the schedule set out in paragraph (1), offer as a tariffed service exchange access that permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation.

(iii) At such time as the national numbering area (area code) plan is revised to require the use of additional digits, each BOC shall provide exchange access to every interexchange carrier, including AT & T, through a uniform number of digits.

3. Notwithstanding paragraphs (1) and (2), with respect to access provided through an end office employing switches technologically antecedent to electronic, stored program control switches or those offices served by switches that characteristically serve fewer than 10,000 access lines, a BOC may not be required to provide equal access through a switch if, upon complaint being made to the Court, the BOC carries the burden of showing that for particular categories of services such access is not physically feasible except at costs that clearly outweigh potential benefits to users of telecommunications services. Any such denial of access under the preceding sentence shall be for the minimum divergence in access necessary, and for the minimum time necessary, to achieve such feasibility.

B. 1. The BOCs are ordered and directed to file, to become effective on the effective date of the reorganization described in paragraph I(A)(4), tariffs for the provision of exchange access including the provision by each BOC of exchange access for AT & T's interexchange telecommunications. Such tariffs shall provide unbundled schedules of charges for exchange access and shall not discriminate against any carrier or other customer. Such tariffs shall replace the division of revenues process used to allocate revenues to a BOC for exchange access provided for the interexchange telecommunications of BOCs or AT & T.

2. Each tariff for exchange access shall be filed on an unbundled basis specifying each type of service, element by element, and no tariff shall require an interexchange carrier to pay for types of exchange access that it does not utilize. The charges for each type of exchange access shall be cost justified and any differences in charges to carriers shall be cost justified on the basis of differences in services provided.

3. Notwithstanding the requirements of paragraph (2), from the date of reorganization specified in section I until September 1, 1991, the charges for delivery of receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, or within reasonable subzones of an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of any interexchange carrier within five miles of an AT & T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered to be in the same subzone as such class 4 switch.

4. Each BOC offering exchange access as part of a joint or through service shall offer to make exchange access available to all interexchange carriers on the same terms and conditions, and at the same charges, as are provided as part of a joint or through service, and no payment or consideration of any kind shall be retained by the BOC for the provision of exchange access under such joint or through service other than through tariffs filed pursuant to this paragraph.

C. 1. Nothing in this Modification of Final Judgment shall be construed to require a BOC to allow joint ownership or use of its switches, or to require a BOC to allow co-location in its building of the equipment of other carriers. When a BOC uses facilities that (i) are employed to provide exchange telecommunications or exchange access or both, and (ii) are also used for the

transmission or switching of interexchange telecommunications, then the costs of such latter use shall be allocated to the interexchange use and shall be excluded from the costs underlying the determination of charges for either of the former uses.

2. Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.

3. Whenever, as permitted by this Modification of Final Judgment, a BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, nothing in this Modification of Final Judgment shall prohibit the BOC from collecting reduced charges for such less-than-equal exchange access to reflect the lesser value of such exchange access to the interexchange carrier and its customers compared to the exchange access provided AT & T.

1983 "FOR HIRE" INTERPRETATION

Excerpt from *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983)

* * * *

VI

Official Services and Other Facilities

With one major exception, the divison of network facilities and other assets is reasonable and fully consistent with the decree.

A. *Official Services*

The Court will not approve the decision made in the plan of reorganization with regard to so-called Official Services. These services represent communications between personnel or equipment of an Operating company located in various areas and communications between Operating Companies and their customers.[175] The plan

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[175] There is some dispute as to whether Official Services are limited to Operating Company internal communications or whether they include communications between an Operating Company and its customers. See AT & T Response to Objections at 95-96 n. *; Supplemental Affidavit of William Weiss, April 12, 1983, at 9; letter from Raymond Burke, April 13, 1983, at 2 n. *.

The Court concludes that for purposes of the discussion and decision herein "Official Services" must properly include customer communications. As Raymond Burke points out (April 13, 1983 letter at 3 n. *),

> no charges apply to communications which AT & T classifies as 'offiical' service . . . [and] even where there is a charge for such services as directory assistance, any inter-LATA administrative facilities involved are not 'for hire.'

Similarly, Thomas Bolger notes (Amended Certification of April 6, 1983, at 5-6),

> a customer in Salisbury, Maryland actually speaks to a directory assistance operator in Baltimore, but that is done solely to facilitate the conduct of these exchange operations in efficient work groups. The customer does not care where his call is

of reorganization provides that Bell System facilities used in whole or in part for Official Services will be assigned according to the same rules applicable to other transmission facilities; meaning that, if facilities are used solely or predominantly to perform inter-LATA functions, they will be assigned to AT & T even if the functions constitute Official Services.[176] Additionally, the Department of Justice has indicated to one or more Operating Companies [177] that it would object if they constructed and operated their own inter-LATA facilities to administer Official Services.[178] In the view of the Court, neither the plan's treatment of Official Service facilities nor the position of the Department of Justice is consistent with the principles underlying the decree.

Each Operating Company conducts its authorized operations in several LATAs. In order to achieve operational efficiencies, the four basic categories of Official Service systems [179] have been designed to serve geographical

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answered and he pays no charge for the referral of his call from a local central office to a distant company location for this purpose.

[176] See AT & T Response to Objections at 95-96.

[177] The several communications from the Department of Justice to the Operating Companies may not be entirely consistent with regard to this subject, however.

[178] See Amended Certification of Thomas Bolger, April 6, 1983, at 5; letter from Raymond Burke, April 13, 1983, at 1.

[179] The Operating Companies manage their business through the following complex networks for the transmission of voice and data communications:

(1) The Operational Support System Network is a network of dedicated voice and data private lines used by the Operating Company to monitor and control trunks and switches. These communications links are vital to the proper operation of the network since, for example, they enable Operating Company personnel to measure the maintenance status of trunks and switches and instantly to control equipment and reroute traffic.

(2) The Information Processing Networks is a network of dedicated data lines linking the Operating Companies' informa-

areas which are usually larger than individual LATAs. For example, the so-called "Operational Support System Networks" (see note 179 *supra*) typically cover an entire state or major portion of a state, permitting the monitoring and controlling of trunks and switches and the routing of traffic from a centralized location. Directory assistance, repair service offices, and business offices likewise serve geographical areas which are larger than individual LATAs.[180]

For the reasons stated below, it makes no sense to prohibit the Operating Companies from using, constructing, and operating on their own the facilities they need to conduct Official Services, whether they be intra-LATA or inter-LATA in character, and to require them instead to lease such facilities from AT & T.[181]

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tion system computer. It is used to transmit data relating to customer trouble reports, service orders, trunk orders from interexchange carriers, and other information necessary for carrying out the Operating Companies' business.

(3) Service Circuits comprise a network of largely dedicated voice lines used to receive repair calls and directly assistance calls from Operating Company customers. These communications ensure the maintenance of telephone service and they provide directory assistance to Operating Company customers.

(4) Voice communications are used by the Operating Companies for hundreds of thousands of calls relating to their internal businesses.

Supplemental Affidavit of William Weiss, April 12, 1983, at 11-12.

[180] As Thomas Bolger, designated chief executive of the Mid-Atlantic Regional Company, has pointed out:

> In order to reduce costs and maximize efficiency, the BOCs have computer processing centers which receive billing and other data from company locations in a number of LATAs. Similarly, calls from Operating Company customers seeking such services as directory assistance are currently routed between BOC offices to centralized locations in other LATAs.

Amended Certification of Thomas Bolger, April 6, 1983, at 5.

[181] The Department of Justice suggests that where Operating Company facilities are transferred to AT & T under the assignment

The Department of Justice recognizes "that the BOCs may have constructed their internal data processing and operational support systems on the assumption that communications links between their facilities would be over BOC-owned facilities," [182] and further that to require such communications to be "placed on commercial facilities might abruptly increase the BOCs' cost of providing service." [183] Yet, relying solely on the curt rationale that such traffic is correctly classified as inter-LATA, the Department supports the assignment of all existing inter-LATA Official Service facilities to AT & T. This solution is both unwise and unnecessary.

Only two alternatives would be available to the Operating Companies under the current plan, both of them undesirable. One option would be for the companies to redesign their Official Service systems so that none of

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process, it would be appropriate for AT & T to lease back to the Operating Company those circuits currently dedicated to Official use. However, an Operating Company's ability to lease existing Official Service facilities from AT & T would be limited to the duration specified in the plan of reorganization for shared facilities—that is, eight years. Department of Justice Response to Comments at 35; AT & T Response to Comments at 115; Amended Certification of Thomas Bolger, April 6, 1983, at 5. After this eight-year period, the Operating Companies would have to hire the services of AT & T or other interexchange carriers to meet all their inter-LATA Official Service needs.

[182] Department of Justice Response to Comments at 35. Indeed, ironically, in spite of the fact that most Operating Company Official Service communications are presently conducted over facilities "owned" by these companies themselves, many such facilities would now, under the plan, be assigned to AT & T. Supplemental Affidavit of William Weiss, April 12, 1983, at 10.

[183] Department of Justice Response to Comments at 35. However, that is precisely what will happen in eight years under the Department's scheme. See note 181 *supra*. Even during this eight-year period, any Official Service demands which cannot be satisfied by existing circuits leased from AT & T would have to be "placed on" commercial facilities of an interexchange carrier.

their internal communications crosses LATA boundaries. This would result in a loss of the operational and cost efficiencies produced by the centralization which currently exists in the local phone system.[184] In effect, a separate, self-contained Operating Company would be created for each LATA—a result clearly not contemplated by the decree.

The other option would be to have the Operating Companies' Official Service communications carried by AT & T or another interexchange carrier. See note 181 *supra*. This alternative would not only be very costly[185] but it suffers from a number of other infirmities. As William Weiss, chief executive-designate of the Midwest Region, points out:

> Speed and reliability are critically important with respect to the BOCs' monitoring and controlling of their switches and trunks. BOC operating personnel and computers must have continuous, instantaneous information regarding traffic loads and the operating status of equipment. When traffic overloads or equipment malfunctions occur, they must have the capability to immediately control equipment and reroute traffic. Forcing the BOCs to rely on third parties for official service communications . . . could seriously jeopardize the BOCs' fulfillment of their responsibilities to provide intra-LATA communications and exchange access. . . .

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[184] In recent years, many of the Operating Companies have achieved significant cost savings through the modernization of their internal management processes. Supplement to Sworn Statement of Wallace Bunn, April 7, 1983, at 5 (47,000 internal computer terminals in operation throughout Southeast region alone).

[185] It has been estimated that for the Mid-Atlantic region alone, the total expenditures for all types of inter-LATA Official Services would be approximately $125 million annually. Amended Certification of Thomas Bolger, April 6, 1983, at 6.

> Moreover . . . [i]n many instances, the BOCs could more efficiently conduct these communications over inter-LATA facilities constructed and owned by the BOCs. The BOCs' ability to deploy new transmission technologies is at least as good and probably better than that of third parties who might provide us with inter-LATA services. The cost of building facilities utilizing those new technologies might be far less than the cost of leasing facilities employing older, and thus higher-priced technologies.
>
> . . . The critical point is that the BOCs should be free to conduct their official services communications in the optimal manner, selecting whichever option is the most reliable and cost-efficient.[186]

Such significant burdens should not be imposed on the Operating Companies unless this is clearly required by the decree. An examination of the decree's provisions shows, however, that a prohibition on the maintenance of inter-LATA Official Service facilities by the Operating Companies is required neither by its spirit nor by its letter.

The Operating Companies are prohibited from engaging in intercity, inter-LATA services in order to prevent a recurrence of the alleged anticompetitive practices of AT & T, which was claimed by the government to have used its local monopolies to disadvantage its intercity competitors in a variety of ways. That rationale is wholly inapplicable to the provision of inter-LATA

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[186] Supplemental Affidavit of William Weiss, April 12, 1983, at 13-14. An increasing number of private corporations with operations dispersed over large geographic areas, such as oil companies and electric power utilities, have opted to construct and operate their own circuits by which their administrative communications are transmitted. Letter from Raymond Burke, April 13, 1983, at 2; see also, Amended Certification of Thomas Bolger, April 6, 1983, at 6; Supplement to Sworn Statement of Wallace Bunn, April 7, 1983, at 6.

service by each Operating Company for its own internal, official purposes.[187] Only by a highly abstract distinction between services that are once and for all labelled "competitive" or "monopolistic" could that prohibition be applied to the Operating Companies' Official Services. Moreover, it is ironic that a prohibition which grew out of AT & T's dominant competitive position and its alleged misuse of that position is now sought to be applied in such a way as to afford AT & T a substantial financial benefit by giving it the opportunity to carry, for a profit, the Operating Companies' own internal official communications which these companies are perfectly able to carry themselves and have, indeed, carried themselves in the past.[188]

Nor is so illogical a result required by the strict terms of the decree. While the Operating Companies are pro-

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[187] The Operating Companies are prohibited from providing inter-LATA telecommunications services under the decree for two reasons: the possibility of discriminatory interconnection practices and the possibility of subsidization of interexchange services with revenues from local exchange services. See 552 F.Supp. at 188-89. Neither of these reasons is implicated by the ownership and operation by an Operating Company of its own inter-LATA Official Service network.

[188] There is also a distinct possibility that AT & T might be able to gain competitive advantages from its control over Operating Company official circuits. Compare 552 F.Supp. at 181 (possible advantage to AT & T from control of electronic publishing business).

In arguing that the Operating Companies should be able to construct and operate their own inter-LATA Official Service facilities, Raymond Burke wrote on April 13, 1983, at 4:

> Indeed, to the extent that the BOCs would need to purchase materials from facilities vendors in order to construct microwave, fibre, and other facilities for their administrative use, it would appear that competition in such markets would be enhanced. In contrast, the Department's interpretation may create a situation in which the BOCs may, practically speaking, be able to obtain their administrative facilities from only one interexchange carrier—AT & T.

hibited by section II(D)(1) from providing "interexchange telecommunications services," section IV(P) defines "telecommunications services" as "offering *for hire* of telecommunications facilities" (emphasis added). Obviously, the Official Services are not "for hire." Similarly, the decree prohibits the Operating Companies from engaging in "information services," but it expressly permits them to engage in such services "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Section IV(J). Further, section I(A)(1) mandates

> [t]he transfer from AT & T and its affiliates to the BOCs . . . of sufficient facilities [to permit them] to perform, independently of AT &T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and *management* of, those functions. (emphasis added).[189]

In light of these provisions, it is thus not surprising that, contrary to its present position, the Department of Justice stated in its competitive impact statement filed with the Court on February 10, 1982, that the Operating Companies will continue to perform those functions which are "inherent" in exchange communications and exchange access, such as "the ability to engage in the . . . management of retained functions." Competitive Impact Statement at 29. Because each Operating Company will perform its authorized services in several LATAs, an in-

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[189] AT & T argues to the contrary that section VIII(G) calls for the assignment to it of facilities which perform both intra-LATA and inter-LATA functions if the use for inter-LATA functions predominates. AT & T Response to Objections at 97. However, that section does not speak at all of inter-LATA and intra-LATA functions but states more simply that

> facilities . . . which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the *use* made by such BOC or BOCs predominates over that of AT & T (emphasis added).

herent part of the management of those services includes official communications which cross LATA boundaries.

For these reasons, the Court rules that an Operating Company shall receive inter-LATA facilities which are used solely or predominantly for the performance of its own Official Service functions. If the use made by an Operating Company of a multifunction facility for the provision of exchange telecommunications, exchange access, and Official Services, predominates in the aggregate (including all such functions) over that made of such facility by AT & T, the multifunction facility is required under section VIII(G) of the decree to be assigned to the Operating Company.[190] The Court further confirms that the decree does not prohibit the Operating Companies from providing their own Official Services, including, if necessary, by the construction of the appropriate inter-LATA facilities.[191]

* * * *

[190] It may be that this provision will not have a significant effect on the assignment of assets because Official Services use may not often tip the scales as between inter-LATA and intra-LATA use. See AT & T Response to Objections at 99.

[191] The Court reaches this question now, rather than after divestiture, so that the Operating Companies may be able to continue their essential network and operational planning.

(2)

No. 90-830

FILED

JAN 25 1991

JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

BELL ATLANTIC CORPORATION

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly interpreted the AT&T consent decree to preclude petitioner, a Bell Operating Company, from providing a "gateway" service linking a customer in one telephone exchange area to a computer in another exchange area without a waiver of the provision of the decree prohibiting the Bell Operating Companies from providing interexchange telecommunications services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 907 F.2d 160. The opinion of the district court (Pet. App. 11a-21a) is reported at 1989-1 Trade Cas. (CCH) ¶ 68,400.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. A timely petition for rehearing was denied on August 28, 1990. Pet. App. 23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The 1982 consent decree that terminated the United States' antitrust suit against AT&T required AT&T to divest its 22 Bell Operating Companies (BOCs). Pet. App.

25a-43a; *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. *sub. nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). The object of the divestiture was to eliminate AT&T's incentive and ability to use its control of the local exchange monopolies to impede competition in the interexchange (long distance) telecommunications market and the telecommunications equipment market. The decree also placed restrictions on the separated BOCs, which now operate the local exchange monopolies. Among other restrictions, the decree provided that no BOC shall "provide interexchange telecommunications services or information services." Section II(D)(1), Pet. App. 28a.

In orders issued in 1987 and 1988, the district court modified some of the decree's line of business restrictions. In particular, the court modified the restriction on the provision of information services to permit the BOCs to provide "gateways" to an information service provider. See Section VIII(K)(1) (Pet. App. 38a); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 591-592 & nn. 297, 300 (1987), modified, 714 F. Supp. 1, 5-7 (D.D.C. 1988), rev'd in part on other grounds, 900 F.2d 283 (D.C. Cir. 1990), cert. denied, No. 90-9 (Oct. 9, 1990). "Gateway services" include "a variety of functions designed to foster interconnection between consumers and information providers." Pet. App. 4a. The gateway service at issue, for example, would allow customers with computers to contact a central processor that would list information services that are available over the telecommunications network and would interact with customers to provide information about the services. Although the BOCs had also requested removal of the prohibition on their provision of interexchange services, the court denied that motion (673 F. Supp. at 552, 562, 567, 602), and the court of appeals affirmed that refusal (900 F.2d at 300-301).

MCI moved the district court to "clarify" its order modifying the information services restriction to make clear that it did not undermine the decree's restriction on BOCs' providing interexchange services. Petitioner Bell Atlantic, a Bell Operating Company, opposed the motion for clarification, stating that "[t]he Court has been quite clear that it has not modified the interexchange prohibition, and no further clarification is required." C.A. App. 266. In denying the motion for clarification, the district court stated that it "did not modify the interexchange prohibition of the decree when it allowed [BOC] participation in the transmission of information services," and noted that "there does not appear to be any confusion on this point." *United States* v. *Western Electric Co.*, 690 F. Supp. 22, 28 (D.D.C. 1988).

Petitioner nevertheless subsequently moved for a declaratory ruling that a gateway system it planned to implement on a trial basis in Pennsylvania would not violate the decree.[1] Petitioner proposed to connect gateway equipment in each of five Pennsylvania local exchange areas (known as LATAs[2]) to one central gateway processor located in Philadelphia. A customer in any of the five LATAs would dial a local telephone number to reach a "protocol agile packet assembler-disassembler" (PAP) located in his

[1] Petitioner did not request, in the alternative, a waiver of the decree prohibition. Section VIII(C) of the decree specifically provides for waivers of the decree's line of business prohibitions upon a showing that there is no substantial possibility that a BOC could use its monopoly power to impede competition in the market it seeks to enter. Pet. App. 36a.

[2] Because the term "exchange area" had long been used by state regulators to mean something different from what the term means in the AT&T consent decree, the parties agreed after the decree was entered to use "LATA" (local access and transport area) as a synonym for "exchange area." *United States* v. *Western Electric Co.*, 569 F. Supp. 990, 993-995 & n.9 (D.D.C. 1983).

LATA. The PAP would connect the customer to the central processor in Philadelphia over a private circuit owned or leased by petitioner. The central processor would then send the customer's computer an introductory "welcoming" screen and a list of information service providers (ISPs). The customer would be able to search the central processor's files to obtain additional information, including listings of providers of particular services, descriptions of those services, and information about the cost of the services. Pet. App. 5a, 12a-13a & n.8. If the customer elected to use the services of an ISP, the central processor would provide the PAP with the necessary information and the PAP would connect the customer to the ISP. In the case of an ISP not located in the customer's LATA, the call would be routed to an interexchange carrier selected by the ISP. C.A. App. 272, 290.[3]

A customer subscribing to petitioner's gateway information service would receive a bill for the total charge attributable to the gateway service. There would be no separate charge listed on the bill for the connection between the customer and the central processor. The single charge for the gateway service would vary according to the duration of that connection, however. Pet. App. 5a, 18a.

2. The district court denied petitioner's motion, holding that the proposal would violate the interexchange prohibition of the decree in the absence of a waiver. Pet. App. 11a-21a. The court noted that "[i]n every significant respect, it would be the central, multi-LATA processor, not the local PAP, that would be the information services gateway" and "that the information and the services at the heart of the gateway service would be provided by that processor [which] may be located in an entirely different LATA than the customer * * * and would perform its

[3] Petitioner does not claim the authority to connect a customer directly to an ISP in another LATA.

functions on an interLATA or interexchange basis." *Id.* at 14a-15a. The court found the conclusion "inescapable that the gateway architecture [petitioner] is proposing would operate on an interexchange basis, and that it would therefore constitute an interexchange service prohibited by section II(D)(1) of the decree." *Id.* at 15a.

The district court rejected petitioner's contention that the gateway service at issue was analogous to "directory assistance" for local telephone service, which the BOCs are permitted to provide across exchange boundaries through an "official services" network. Pet. App. 15a-19a; see *United States* v. *Western Electric Co.*, 569 F. Supp. 1057 (D.D.C. 1983), aff'd *sub nom. California* v. *United States*, 464 U.S. 1013 (1983) (*Official Services*) (partially reproduced at Pet. App. 44a-52a). The court explained that its 1983 decision sanctioning centralized official services was part of the process of reorganizing the AT&T system to separate the local telephone exchanges from the long distance network. It held that the preexisting official services network was "an inherent part of the provision of exchange communications" by a BOC and that it need not be redesigned after divestiture. *Id.* at 16a-17a. Bell Atlantic's gateway proposal, on the other hand, involved the establishment of a new competitive service on an interexchange basis. *Id.* at 18a.

Moreover, the court explained, although the gateway service would permit a customer to obtain access to an information service provider, it was not analogous in nature to simple directory assistance. Gateway subscribers would interact extensively with the central processor and would be charged according to the time they were connected to it. Pet. App. 18a-19a. Thus, the court concluded, petitioner's new service was more closely analogous to interLATA time and weather services and interLATA directory assistance to independent telephone companies, which the BOCs are prohibited from providing under Section

II(D)(1) of the decree in the absence of a waiver. *Id.* at 19a; see *United States* v. *Western Electric Co.*, Civ. No. 82-0192 (D.D.C. Feb. 6, 1984), slip op. 6 n.9 (C.A. App. 39).

3. The court of appeals affirmed. Pet. App. 1a-10a. Petitioner argued on appeal that the interexchange portion of the proposed gateway service would not be offered "for hire"—and would not, therefore, constitute an "interexchange telecommunications service" within the meaning of the decree[4]—because the interexchange portion of the service would not be separately identified or separately charged to the customer. The court of appeals refused to accept that "strained interpretation" of the phrase "for hire," noting that this view would allow the BOCs to provide any interexchange services so long as they were packaged with some permitted service. *Id.* at 7a.

The court also rejected petitioner's claim that the district court's 1983 *Official Services* decision permitting the BOCs to provide interLATA directory assistance compelled a finding that interLATA transmission of gateway communications are not services "for hire." Pet. App. 8a-10a. The court of appeals first stated that it was not bound by the earlier decision of the district court. *Id.* at 9a. It then noted that "[i]n 1983 the district court was faced with a one-time daunting task, the allocating of existing facilities to either AT&T or the BOCs—and the court and the parties may well have preferred a measure of pragmatism to logic." *Id.* at 10a. The court of appeals did not reach the question whether the district court had in fact, as petitioner contended, intended in its 1983 *Official Services* decision to hold that directory assistance is not "for hire." *Id.* at 9a-10a & n.5.

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[4] The decree prohibits the BOCs from providing "interexchange telecommunications services," and defines a "telecommunications service" as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." Section IV(P); Pet. App. 32a.

Finally, the court of appeals acknowledged petitioner's argument that it would be prohibitively expensive to place a central processor in each LATA. That argument, it observed, may be a "powerful argument for a waiver from the terms of the decree, * * * a route appellants chose to bypass." Pet. App. 10a.

ARGUMENT

Petitioner seeks to have this Court interpret the terms of a particular consent decree. The lower courts' construction of those terms is consistent with the language of the decree and creates no conflict with the decisions of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. A consent decree is to be construed as a contract. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975). Thus, the initial guide to decree construction is the language of the decree itself, as used "in its natural sense" and in relation to its normal meaning. *United States* v. *Armour & Co.*, 402 U.S. 673, 678 (1971); *ITT Continental Baking*, 420 U.S. at 236; *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959).[5] Contrary to petitioner's claim (Pet. 12-14, 18-20), the courts below applied those principles of construction and properly concluded that petitioner's proposed gateway service is prohibited by the terms of the decree.

The decree prohibits the BOCs from providing "interexchange telecommunications services." Section II(D)(1); Pet. App. 28a. "Interexchange telecommunications" is defined as "telecommunications between a point or points

[5] Aids to construction of the sort properly taken into account in construing a contract, including the circumstances surrounding the formation of the decree and any technical meaning that the words used may have had to the parties, are also appropriately considered. *ITT Continental Baking*, 420 U.S. at 238; *Atlantic Refining*, 360 U.S. at 22.

located in one exchange telecommunications area and a point or points located in one or more other exhange areas." Section IV(K); Pet. App. 32a. A "telecommunications service" is defined as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." Section IV(P); Pet. App. 32a. Petitioner concedes (Pet. 14) that its proposed service involves "interexchange telecommunications" since it proposes to connect callers in one LATA with a central processor in a different LATA, relying exclusively on facilities that it owns or leases. Petitioner also concedes (*ibid.*) that its gateway service is "for hire." It contends, however, that the interexchange telecommunications involved in the gateway service are not "for hire" and, therefore, that no interexchange telecommunications service is involved. The court of appeals properly rejected this "strained interpretation" of the decree. Pet. App. 7a.

The decree does not define which telecommunications services are offered "for hire." But a common-sense interpretation would include any telecommunications service that constitutes a major and essential component of a telecommunications service that is concededly "for hire," particularly where the charge for the total service varies with the duration of the component telecommunications service. The court of appeals rightly concluded that bundling the cost of the interLATA connection with the other component costs of gateway service does not render the connection to the central processor any less a service "for hire." Pet. App. 8a.[6]

Petitioner urged the courts to look beyond the "four corners" of the AT&T consent decree to the concept of common carrier status under various statutes in interpret-

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[6] Petitioner proposed to lease, rather than construct and own, the interLATA facilities in this case. The court of appeals correctly concluded that the ownership of the facilities is not determinative. Pet. App. 8a.

ing the term "for hire." Unlike those statutes, however, the decree does not use the term "for hire" as a definition of, or in conjunction with, the term "common carrier."[7] In any event, the cases on which petitioner relies do not advance its cause. Rather, they establish that the carriage of a customer's property or communication constitutes service "for hire," regardless of the manner in which payment is received.[8]

2. Petitioner also claims that the lower courts' ruling in this case is inconsistent with the district court's 1983 *Official Services* decision, which allowed each BOC to offer local telephone directory assistance on a centralized basis, across LATA boundaries. Pet. 14, 16-18. As the court of appeals pointed out, however, even if petitioner were correct in its assertion that its service is indistinguishable from

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[7] Petitioner's argument that some businesses make use of interexchange telecommunications and recover the costs in charges for other products without being deemed to provide interexchange telecommunications for hire (Pet. 15-16) is without force. The decree in this case restricts the conduct of AT&T and the BOCs. Its restrictions do not apply to, and were not drafted to take account of, the activities of other firms.

[8] *E.g., United States* v. *California*, 297 U.S. 175, 182-183 (1936) ("[a]s the service involves transportation of the cars and their contents, the method of fixing the charge is unimportant"); *Stimson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 210-211 (1927) ("one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier"); *McCrea* v. *Harris County Houston Ship Channel Navigation District*, 423 F.2d 605, 608 (5th Cir.), cert. denied, 400 U.S. 927 (1970) ("common carrier" status depends on whether an entity is performing a part of the total rail service contracted for by a member of the public and is receiving remuneration for it in some manner).

This Court's decision in *Red Ball Motor Freight* v. *Shannon*, 377 U.S. 311 (1964), on which petitioner relies (Pet. 15-16), is inapposite. The issue in *Red Ball* was whether respondent's back-hauling of sugar constituted legitimate "private carriage" that furthered "a *noncarrier* business" or was "for-hire carriage" requiring certification from the

directory assistance, the appellate courts have not previously been presented with the issue decided by the district court in 1983 and are not bound by the district court's ruling. Pet. App. 9a, citing *Anderson* v. *Celebrezze,* 460 U.S. 780 (1983).[9]

In any event, as the district court concluded, the 1983 decision did not establish a sweeping rule that no directory-type service offered across LATA boundaries is a service for hire. The issue in *Official Services* was the proper division of the Bell System's assets between the soon-to-be-divested BOCs, which were to operate the local telephone exchanges, and AT&T, which was to retain the long distance network. Because the Bell System's network had not been designed with this divestiture in mind, the assets did not fall neatly into the two categories. In particular, networks carrying "official services" (services that "represent communications between personnel or equipment of an

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ICC. *Id.* at 314 (emphasis added). The Court found in the legislative history of Section 203(c) of the Interstate Commerce Act, 49 U.S.C. 303(c) (1976), a congressional intent to ground this determination on the "primary business" of the carrier. 377 U.S. at 314-317. The Court ultimately concluded that Shannon's sugar hauling was not "for-hire transportation" because it was "within the scope, and in furtherance, of [its] *noncarrier* business enterprise" as a dealer in commodities. *Id.* at 319 (emphasis added). The Court also relied on the fact that Shannon's assets were not in large part composed of transportation facilities, nor was transportation a major item of expense. *Id.* at 320. The interLATA telecommunications connection that petitioner proposes to operate, on the other hand, is an integral part of a telecommunications service concededly offered "for hire" by a firm in the business of providing telecommunications services.

[9] This Court summarily affirmed the *Official Services* decision, but whether directory assistance was offered "for hire" was not raised by any of the parties on appeal and thus was not the basis of the Court's summary affirmance. As this Court stated in *Celebrezze,* "the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' " 460 U.S. at 784-785 n.5.

Operating Company located in various areas and communications between Operating Companies and their customers" (Pet. App. 44a)) posed a problem because they crossed LATA boundaries. The district court decided to assign those facilities to the BOCs because it did not believe that the BOCs should be forced to rely on AT&T for services integral to local telephone service.[10] The district court also decided to allow the BOCs to continue operating the networks on a centralized basis because the alternative was to require them to reconstruct the system to set up a separate network in each LATA. *Id.* at 44a-50a.[11] This reasoning does not suggest that the district court thought it was establishing a broad rule for the future allowing the BOCs to design new networks offering new services in competitive markets on an interLATA basis without obtaining a waiver.

Subsequent events confirmed that the *Official Services* result was not intended to apply to all directory-type services. Thus, the district court ruled soon after the *Official Services* decision that even interLATA directory assistance to other independent telephone companies was not permitted under the decree in the absence of a waiver. *United States* v. *Western Electric Co.*, Civ. No. 82-0192 (D.D.C. Feb. 6, 1985), slip op. 6, n.9; C.A. App. 39.

Moreover, as the district court pointed out, the directory service at issue here is not comparable to the "white pages" directory service at issue in the *Official Services* decision. Although the proposed gateway's central proces-

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[10] See Competitive Impact Statement, 47 Fed. Reg. 7170, 7176 n.24 (1982) ("the provision of a listing of the phone numbers and addresses of subscribers and the related directory assistance function are inherent parts of exchange telecommunications").

[11] Petitioner asserts (Pet. 16) that "all the parties to the decree" shared the view that directory assistance did not amount to an offering of long-distance service "for hire." However, none of the parties even addressed the "for hire" point. See Pet. App. 44a-45a.

sor contains what can be termed a "directory" of information service providers, it provides much more than the phone number of the ISPs. The customer interacts with the gateway, seeking information about subjects of interest, relaying further requests back to the central processor, and deciding which, if any, ISP may provide the information being sought. The gateway itself is the service the customer is hiring from the BOC; the BOC does not itself provide the services about which it provides information to the customer. White page users, on the other hand, are "hiring" local telephone service, and the directory is an incidental service provided to facilitate its use.

Accordingly, there is no inconsistency in the lower courts' refusal to extend the treatment afforded the preexisting official services network in 1983 to petitioner's proposed interLATA gateway service. The lower courts' interpretation of the decree to prohibit such service in the absence of a waiver is consistent with the language of the decree.[12] In these circumstances, there is no need for review by this Court.

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[12] Petitioner asserts that the decision below impairs its ability to provide consumers with low-cost gateway services. Pet. 18. But the prohibition of Section II(D)(1) is unconditional; it makes no exception for "lost efficiencies." And when the district court modified the decree to permit the BOCs to offer gateway services, it explained that the BOCs would have flexibility to design and create an information service network *only* "[i]nsofar as this goal is attainable without interfering with the core decree restrictions" (714 F. Supp. at 12 n.42) and *only* to the extent that specific restrictions and conditions are observed (*id.* at 12). Moreover, if petitioner can show that its proposed gateway architecture would not afford it the opportunity to use its local telephone monopoly to impede competition in the interexchange market, it can obtain a waiver under Section VIII(C) of the decree. See note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

* The Solicitor General is disqualified in this case.

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No. 90-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BELL ATLANTIC CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T's OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in ACE Limited; Paradigm Technology, Inc.; Sundisk Corporation; Resound Corporation; Intermetrics Inc.; Telehouse America, Inc.; Communications Software Development, Inc. (Mitek Systems, Inc.); Compagnie Industriali Riunite S.p.A. (CIR); Sun MicroSystems, Inc.; Societa' Italiana Telecommunicazioni S.p.A. (Italtel); Canadian Distance Learning Development Centre Ltd.; Truevision, Inc.; Atesia S.p.A.; Jamaica Digiport International, Ltd.; Omnicad; Novo Quality Services Pte. Ltd. (Singapore); Western Electric Saudi Arabia, Ltd. (WESA); GoldStar Information and Communications Co. Ltd.; Airways Facilities Engineering Co.; AG Communications Systems Corporation; APT Italia S.A.; CA Charlotte Associates; Grassmere Park Associates; 155334 Canada Inc. (Canada); Tower Center Associates; ABC Travelbank Limited; AT&T Credit FSC, Inc.; AT&T Fleet Services; AT&T JENS Corporation (Japan); AT&T of Shanghai, Ltd.; Call Interactive; Cuban American Telephone and Telegraph Co. (Cuba); Facilities Management Services Limited; GoldStar Fiber Optics Co., Ltd. (Korea); PITS Holding BV; Rosewood Associates; AT&T ISTEL Purchasing Systems Limited; AT&T Network Systems Espana SA; AT&T Ricoh Company Ltd. (Japan); InView Limited; LITESPEC Inc.; LYCOM A/S (Denmark); Claimview Limited; ISTEL Holdings Limited; AT&T Taiwan Telecommunications Co., Ltd.; Failsafe ROC Limited; AT&T Network Systems International BV (Netherlands); Agricultural Commodities Services Limited; InView Holdings Limited; VIEWTEL Holdings Limited; AT&T Automotive Services, Inc.; AT&T Europe s.a./n.v. (Belgium); AT&T (UK) Ltd.; AT&T Telecomunicacoes Ltda. (Brazil); AT&T France S.A.· Eastern Telephone and Telegraph Company (Canada); and AT&T Hong Kong Limited.

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AT&T's OPPOSITION TO PETITION FOR CERTIORARI

REASONS FOR DENYING THE WRIT

Petitioner Bell Atlantic Corporation is seeking review of a decision that construed one provision of the 1982 antitrust consent decree that broke up the former Bell System. In this decision, the District of Columbia Circuit held that the divested Bell Companies ("RBOCs") cannot avoid the Decree's core interexchange services injunction by "bundling" or "packaging" prohibited long distance services with those telecommunications or nontelecommunications services that the RBOCs are authorized to provide.

There is no basis for Supreme Court review of this decision. It does not conflict with any decision of this Court or of any court of appeals. To the contrary, the Court of Appeals has simply applied well-established principles of decree construction to the unique facts of this case. The Court of Appeals' decision was compelled by the "four corners" of the 1982 Decree, by other contemporaneous evidence of the parties' intent, and by the uniform subsequent interpretations of both the original parties to the Decree and the District Court that administers it.

The only way Bell Atlantic can challenge this holding is by ignoring, or misstating, both these facts and the grounds for the Court of Appeals' holding.

1. The principles that govern the construction of antitrust and other consent decrees are well settled. Consent decrees are "to be construed . . . basically as a contract." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). The court is to examine the "four corners" of the decree (*United States* v. *Armour & Co.*, 402 U.S. 673, 681-83 (1971)), and "as with any other contract," the Court may rely on such "aids to construction" as the "circumstances surrounding the formation of the consent order," the mutual purposes of the parties when ascertainable, and the prior interpretations of the parties and the Court. *ITT Continental Baking*, 420 U.S. at 238; *see Restatement of Contracts 2d*, §§ 202(1), 223(1). The District Court and the District of Columbia Circuit have repeatedly applied these principles in construing the 1982 consent decree at issue here.[1]

2. Bell Atlantic argues that the Court of Appeals has nonetheless here violated the "four corners" rule of decree construction. This is nonsense. The Court of Appeals rested its construction of the Decree's interexchange services injunction on the ground that the Decree's *definition* of interexchange telecommunications includes any service in which the RBOC offers interexchange facilities for hire, whether or not the "interexchange portion" of the service is separately identified and separately charged for. App. 7a-8a; *see* Decree, Section IV(F) & IV(P) (App. 30a & 32a).

As the Court of Appeals emphasized, that definition is essential to prevent the wholesale subversion of the parties' mutual purpose—as stated in the contemporaneous Tunney Act record—of

[1] *E.g.*, *United States* v. *Western Electric Co.*, 894 F.2d 1387, 1390-95 (D.C. Cir. 1990); *id.*, 900 F.2d 283, 293-300, 305-09 (D.C. Cir. 1990); *id.*, 894 F.2d 430, 434-38 (D.C. Cir. 1990); *id.*, 846 F.2d 1422, 1427-31 (D.C. Cir. 1988); *id.*, 797 F.2d 1082, 1089-91 (D.C. Cir. 1986); *id.*, Opinion, pp. 3-4 (D.D.C. Feb. 26, 1986); *id.*, 627 F. Supp. 1090, 1093-1113 (D.D.C. 1986).

preventing "any recurrence" of disputes over whether the RBOCs had misused their bottleneck monopolies to impede competition in the long distance business.[2] By contrast, Bell Atlantic's "strained" construction would allow the RBOCs to provide "extensive" interexchange services by "simply packaging that service with some other noninterexchange telecommunications service or even nontelecommunications service." App. 7a. As commentators have demonstrated, line of business and other restrictions could be evaded at will through such "bundling."[3]

3. Thus, contrary to its own contention, Bell Atlantic is ultimately reduced to arguing that the Court of Appeals should have gone *outside* the "four corners" of the Decree and the contemporaneous Tunney Act record of its purposes. In Bell Atlantic's view, the court should have given dispositive weight to a subsequent 1983 ruling that authorized the RBOCs to provide certain interexchange transmission services in four narrow conditions—only one of which even arguably involved interexchange telecommunications for hire. *Compare* Pet. 16-18, *with Opinion*, 569 F. Supp. 1057, 1066-1071 (D.D.C. 1983).

However, as the District Court (App. 15a-19a) and the Court of Appeals stated (App. 8a-10a), this 1983 order cannot remotely be read as adopting Bell Atlantic's proposed interpretation of the interexchange services injunction, but was, at most, a "pragmatic" decision to waive this restriction in that one narrow condition. Indeed, no other reading is possible because the original parties and the District Court rejected Bell Atlantic's proposed interpretation in three other contemporaneous orders in 1983 and early

[2]*E.g.*, *United States* v. *AT&T*, 552 F. Supp. 131, 142 & 167-68 (D.D.C. 1982); *see* Competitive Impact Statement of United States, pp. 8, 38-42 (Feb. 16, 1982); AT&T's Reply, pp. 45-46 (May 21, 1982).

[3]*See* R. Posner & F. Easterbrook, *Antitrust*, p. 809 (2d ed. 1981) (attempted evasion of gasoline price controls by providing a rabbit's foot along with each sale of gasoline); *see also id.*, pp. 802-10 (discussing other such cases).

1984 (and in one 1986 order). In these four orders, as here, the court held that the interexchange injunction bars the RBOCs from providing customers with interexchange facilities for use with the RBOCs' authorized telecommunications services, whether or not an RBOC separately charges for the interexchange portions of the services.[4] *See* App. 15a-20a (discussing prior rulings).

Thus, because the Court of Appeals' holding was compelled by the subsequent interpretations of the Decree as well as by its terms and original purposes, the question of whether and when a court of appeals is bound by prior unappealed district court rulings is simply not presented. *Compare* Pet. 16-17, *with United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 21-24 (1959).

4. Finally, there is no substance to Bell Atlantic's argument that the Court of Appeals' holding will prevent the RBOCs from efficiently offering whatever "information services" they are now, or hereafter, authorized to provide. Pet. 18-20.

Information services are services in which customers place telephone calls to computers in order to retrieve, store, or manipulate information. Contrary to Bell Atlantic's claim (Pet. 19), the

[4]First, in 1983, the District Court held that the interexchange injunction bars the RBOCs from providing the long distance facilities and services used in offering authorized cellular radio mobile telephone service or one-way paging services across exchange boundaries, unless a waiver is granted. *United States* v. *Western Electric Co.*, 578 F. Supp. 643, 644-46 (D.D.C. 1983) (granting some such waivers but denying others). Second, in 1983 and again in 1984, the District Court held that, absent a waiver, the RBOCs could not provide the interexchange facilities that customers would use to call time and weather information numbers when the information service computer was located in a second exchange. *Id.*, 578 F. Supp. 658, 661 (D.D.C. 1983); *accord*, *id.*, Memorandum, p. 6 n.9 (D.D.C. Feb. 6, 1984). Third, in 1986, the District Court held that the interexchange injunction bars the RBOCs from providing interexchange services in connection with the authorized businesses of providing customer premises equipment. *Id.*, 627 F. Supp. 1090, 1100-02 (D.D.C. 1986).

Court of Appeals' holding would not prevent an RBOC from providing these services in centralized computers so long as the RBOC does not also provide interexchange facilities and services to its information services customers. To the contrary, the RBOCs may adopt this centralized architecture for their authorized information services so long as their customers obtain the long distance services required to call the central computer from AT&T, MCI, or one of the nation's several hundred other long distance carriers.

Further, the RBOCs are free to seek waivers to provide interexchange services by claiming that the otherwise prohibited offerings would be *de minimis* and incidental to other "primary businesses" and would not present the threats to competition that the Decree sought to prevent.[5] By contrast, as the Court of Appeals held (App. 7a-8a), Bell Atlantic's proposed construction would allow the RBOCs to recreate the very combinations that the Decree sought to end. This vividly underscores that the Court of Appeals' decision is a correct application of well-settled principles.

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[5]Bell Atlantic's reliance (Pet. 15-16) on *Red Ball Motor Freight, Inc.* v. *Shannon*, 377 U.S. 311 (1964), is wholly misplaced. Unlike the statute at issue there, Section II(D)(1) does not adopt a "primary businesses" test, but is a *per se* prohibition against the RBOCs' provision of any interexchange services for hire. Thus, contentions that the interexchange services are *de minimis* and incidental to other activities are irrelevant to the application of the interexchange injunction of Section II(D)(1). By contrast, these claims could be grounds for waivers under Section VII or Section VIII(C). *See* App. 36a. Indeed, waivers have been granted on such grounds in the past. *United States* v. *Western Electric Co.*, 578 F. Supp. 643, 647-52 (D.D.C. 1983) (cellular waivers); *id.*, 578 F. Supp. 658, 661 (D.D.C. 1983) (time and weather waivers).

CONCLUSION

For the reasons stated, the petition should be denied.

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No. 90-830

IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As respondents' briefs confirm, no coherent principle rooted in the text of the consent decree can reconcile the district court's disparate interpretations of "for hire." Though respondents pay lip service to *Armour*'s "four corners" rule, they ultimately rest their defense of the result below on the same non-textual policy considerations that animated the lower courts' decisions.

A. Nothing in the Text of the Decree Bars a Bell Company's Use of Long-Distance Service To Communicate With Its Own Customers

The United States correctly acknowledges that the words of a consent decree must be given a "common-sense" interpretation consistent with their "natural" and "normal" meaning. US Br. 7, 8. But its construction of "for hire" fails that standard. A company that communicates with its customers over long-distance lines does not, in any ordinary sense of the phrase, thereby offer long-distance service "for hire," even if, as one would expect, the company recovers its long-distance costs in the overall price for its goods or services. The company is no more a seller of long-distance services in such circumstances than it is a seller of any other component of its overhead, such as electric power, office space, or clerical services.

The United States apparently recognizes that its reading of "for hire" would make little sense in the case of an ordinary business. US Br. 9 n.7. The United States asserts, however, that the phrase should be given a special meaning in the case of a telecommunications business (thereby contradicting the concession that the phrase should be construed in its "normal" sense). According to the United States, a company like Bell Atlantic offers prohibited long-distance service "for hire" if long-distance communication is "a major and essential component" of the company's overall service and if "the charge for the total service varies with the duration" of the connection. US Br. 8.

But this attempt to rationalize the lower courts' "pragmatic" rewriting of the decree has no anchor in the text. The meaning of "for hire" is not a mystery. In *Red Ball*, the Court held that a livestock producer does not "engage in any for-hire transportation business" by using trucks to deliver its own livestock and then to

backhaul sugar (*see* Pet. 15-16). Bell Atlantic likewise provides no prohibited interexchange service "for hire" by using long-distance facilities to deliver its own gateway information.[1]

AT&T argues that a natural interpretation of "for hire" would lead to a "wholesale subversion" of the decree's interexchange services prohibition. AT&T Br. 2.[2] This Court's response to a similar assertion in *Armour* applies with equal vigor here:

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[1] The United States' reading of "for hire" does not support the decision of the lower courts in any event. The interexchange facilities used by Bell Atlantic's proposed gateway service are not a "major" component of the service; they constitute *less than one percent* of the cost of providing the service. C.A. App. 354.

The United States' assertion that the interexchange facilities are "essential" to the gateway service adds nothing to the analysis. By definition, interexchange facilities are "essential" to the communication of information from one exchange area to another, just as interstate motor carriage was essential to the transportation of livestock and sugar between Louisiana and Texas in *Red Ball*. If indispensibility were the test, the district court could not have ruled, as it did (*see* Pet. App. 22a), that the decree permits Bell Atlantic to provide centralized gateway-related technical assistance and administrative functions. Interexchange communication is as "essential" to the provision of those technical and administrative functions as it is to the gateway directory assistance function.

The United States' final suggestion—that use of interexchange facilities amounts to a "for hire" offering if the charge for the overall service varies with the duration of the connection—also misses the mark. A longer call incurs a higher charge because the caller receives more information. The significant fact, however, is not that Bell Atlantic's overall charge varies with duration, but that the charge does not vary with the use of interexchange facilities. C.A. App. 283. The cost of the interexchange circuits is simply overhead; no portion of the charge for gateway service varies with whether a particular call is local or long-distance.

[2] AT&T expressed no such concern before the district court. Although ordinarily a militant defender of the interexchange services prohibition, AT&T did not even bother to file a brief on the merits when the issue was first raised.

> This argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, *where we deal with the construction of an existing consent decree, such an argument is out of place.*

402 U.S. at 681 (footnote omitted) (emphasis added).

It is not true, as AT&T claims, that an unnatural interpretation of the decree "is essential" to prevent Bell Atlantic from "imped[ing] competition in the long distance business." AT&T Br. 2-3. In its 1983 decision, the district court found that barring the Bell companies' own use of interexchange facilities is not necessary "in order to prevent a recurrence of the alleged anticompetitive practices of AT&T," and therefore that the rationale for the interexchange prohibition is "wholly inapplicable" in these circumstances. *United States v. Western Electric Co.*, 569 F. Supp. at 1100 & n.187 (Pet. App. 49a-50a & n.187). In fact, the United States admitted below that *barring* Bell Atlantic's use of these facilities "could well be anticompetitive." C.A. US Br. 31 n.33.

B. Respondents' Efforts To Distinguish the 1983 Interpretation of "For Hire" Have No Basis in the Text of the Decree

As respondents acknowledge, the district court ruled in 1983 that the decree permits the regional Bell companies "to offer local telephone directory assistance on a centralized basis, across LATA boundaries." US Br. 9; *see* AT&T Br. 3. There is no material difference between "411" voice directory assistance and gateway directory assistance. If the interexchange restriction does not bar one, neither can it bar the other.

AT&T asserts that the 1983 ruling was not an interpretation of "for hire" but rather "a 'pragmatic' decision to *waive*" the interexchange restriction in the case of voice directory assistance. AT&T Br. 3 (emphasis added). But the district court in 1983 specifically construed "the strict terms of the decree," holding unambiguously that the long-distance component of a centralized directory assistance function "[o]bviously" is "not 'for hire'" within the "letter" of the interexchange prohibition. 569 F. Supp. at 1100 (Pet. App. 49a-51a). AT&T's groundless recharacterization of the decision betrays an inability to articulate a principled distinction between voice directory assistance and gateway directory assistance.

The United States argues that voice directory assistance, unlike gateway directory assistance, is "integral" and "incidental" to the provision of local telephone service. US Br. 11-12. The United States asserts that the gateway central processor provides more information than can be obtained from voice directory assistance and permits more "customer interact[ion]." *Id.* But the United States neglects to explain how these considerations, even if accurate, bear on whether the long-distance component is offered "for hire." The decree says nothing about "integral" or "incidental" services; it nowhere mentions "customer interaction." Even if these distinctions have some basis in regulatory policy, they are utterly without foundation in the text of the consent decree and cannot justify inconsistent interpretations of the decree.

The United States' claim that the 1983 ruling was not intended to establish "a broad rule" of interpretation (US Br. 11) is belied by the ruling itself (*see* 569 F. Supp. at 1101 n.191 (Pet. App. 52a n.191)) and is tantamount to sanctioning *ad hoc* administration of the decree. Consistent and predictable interpretation of a consent decree is an essential element of the "four corners" rule and an indispensable limitation on the exercise of Article III power. *See United States v. Atlantic Refining Co.*, 360 U.S. 19, 22 (1959). To suggest that an interpretation establishes no "rule" for the future is to

give courts free rein to administer consent decrees with an eye to policy rather than text.[3]

C. The Disregard of the Decree's Text Can Be Remedied Only by Plenary Review

Respondents argue that this Court should not disturb the lower courts' unlawful departure from consistent, principled decision-making because the lower courts' "pragmatism" has done no harm in this instance.

AT&T asserts that Bell Atlantic's customers can "efficiently" obtain gateway information by arranging their

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[3] Respondents mistakenly assert (US Br. 11; AT&T Br. 3-4 & n.4) that rulings subsequent to the 1983 decision eroded the district court's interpretation of "for hire." The United States points to a 1984 decision in which the district court held that centralized directory assistance could not be provided to customers of independent telephone companies because the service involved communications with persons who were not the Bell company's *own* customers. *United States v. Western Electric Co.*, No. 82-0192, slip op. at 6 n.9 (D.D.C. Feb. 6, 1984) (C.A. App. 39 n.9). In the gateway service at issue here, by contrast, Bell Atlantic will be communicating only with its own customers.

AT&T relies on a series of three rulings. None interpreted the "for hire" provision, and none purported to reconsider the district court's 1983 decision. The first ruling held that the Bell companies could not offer interexchange paging and cellular radio services without a waiver. *United States v. Western Electric Co.*, 578 F. Supp. 643, 644-46 (D.D.C. 1983). The common carrier services at issue there, however, were designed to transmit information of the customers' choosing, not merely (as here) communications between the Bell companies and their own customers. The second ruling allowed the Bell companies to centralize the provision of time and weather information; the court granted a waiver from the decree's interexchange restriction, instead of construing it to permit such centralization, in order to *avoid* setting a precedent. *United States v. Western Electric Co.*, 578 F. Supp. 658, 661 (D.D.C. 1983). The third ruling held that a Bell company could not resell long-distance "common carrier" service as part of a "package" with telephone equipment that the Bell company was permitted to sell. *United States v. Western Electric Co.*, 627 F. Supp. 1090, 1100 n.39, 1101 n.43 (D.D.C. 1986). The gateway directory service at issue here does not provide long-distance common carriage for use by the customer.

own interexchange transport through AT&T, MCI, or another long-distance carrier. AT&T Br. 4-5. But the district court found that gateway services are obtained by the customer making a local telephone call. Pet. App. 11a n.3. Bell Atlantic will be placed at a severe competitive disadvantage if its customers are required to place a toll call, while customers of competing gateways such as Prodigy and Compuserve can obtain centralized information by means of a local call. Information providers typically deliver their information to the customer's doorstep. Barring Bell Atlantic's local delivery of its information would be no less crippling than barring Dow Jones's delivery of its newspapers or NBC's delivery of its broadcast television programs.

Respondents further assert (US Br. 12 n.12; AT&T Br. 5) that the possibility of obtaining case-by-case waivers of the interexchange prohibition ameliorates the lower courts' failure to follow *Armour* and *Atlantic Refining*. Yet, only a few days ago, the United States urged the district court to "eliminat[e] the waiver process for information services." Reply of the United States in Support of Motions for Removal of the Information Services Restriction at 29 (Jan. 18, 1991). The United States explained that "the case-by-case approach to information services is itself anticompetitive. The waiver process imposes significant delay and expense upon the introduction and modification of BOC information services, and it has thus substantially frustrated the development of information services that would benefit consumers." *Id.* at 29-30.[4] The court of appeals itself noted

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[4] The United States further explained: "To obtain a waiver, a BOC must describe its service to the Department, the Court—and its competitors. This process tends to freeze technology and to chill innovation and competitive response by the BOCs. Further, if a BOC, after obtaining a waiver, discovers a better way to provide the service or a way to provide additional related services and take advantage of scope economies, it must go back to the Department and the Court, reveal its new ideas, and wait again before it can do so. The waiver process also invites abuse from competitors seek-

that the waiver process "can be time-consuming and onerous." Pet. App. 7a. For example, AT&T says that "waivers have been granted . . . in the past" for cellular radio services. AT&T Br. 5 n.5. Bell Atlantic sought one such waiver in 1985; the district court has not yet issued a decision on the application.

* * * *

The question in this case is not merely whether the regional Bell companies are authorized under the decree to provide centralized gateway services, but whether the district court is empowered under Article III to wield free-ranging regulatory dominion over the telecommunications industry. As one former Circuit Judge recognized, the problem here is that "generalist courts are singularly ill-situated to regulate complex industries under the rubric of a solitary consent decree resolving a single (albeit important) lawsuit." *United States v. Western Electric Co.*, 846 F.2d 1422, 1435 (D.C. Cir. 1988) (Circuit Judge Starr, dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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ing to delay BOC entry. Even absent abuse, the inherent delay, like the information services restriction itself, impedes competition and hurts consumers; the only beneficiaries are existing competitors." *Id.* at 30 (citation and footnote omitted).